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## JUDGES AS FILM CRITICS: NEW APPROACHES TO FILMIC EVIDENCE

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Jessica M. Silbey\*

*This Article exposes internal contradictions in case law concerning the use and admissibility of film as evidence. Based on a review of more than ninety state and federal cases dating from 1923 to the present, the Article explains how the source of these contradictions is the frequent miscategorization of film as “demonstrative evidence,” evidence that purports to illustrate other evidence, rather than to be directly probative of some fact at issue. The Article further demonstrates how these contradictions are based on two venerable jurisprudential anxieties. One is the concern about the growing trend toward replacing the traditional testimony of live witnesses in court with communications via video and film technology. Another anxiety is the public perception of the trial itself as undisciplined and capricious rather than as controlled and truth-establishing. The Article concludes by showing that these anxieties are not well-founded because, when filmic proffers are properly considered, they are admitted as substantive and testimonial evidence. As a result, they are (or should be) subject to hearsay rules and cross-examination and to other rules intended to safeguard the integrity of the trial.*

*The analysis in *Judges as Film Critics* is a continuation of the author’s prior research and publications in the field of law and culture, and draws from evidentiary doctrine and legal scholarship as well as from contemporary film theory and history. This combination takes a fresh look at filmic evidentiary proffers and questions the very assumptions that govern the meaning they are said to project, in light of contemporary theory devoted to the interpretation of film. Such an analysis reconsiders the legal categories that regulate the use of filmic evidence—such as demonstrative, substantive, and real evidence—and begins the development of a more nuanced and common sense doctrine governing the treatment and meaning of film in the courtroom. In light of the long history of the use of film in court and the growing use of visual media in the courtroom, it is time to make sense of the case law purporting to explain the admissibility of filmic evidence in terms of a discipline devoted to the film medium.*

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"The errors here involved . . . permitting the plaintiff to convert the court into a 'movie' picture theater . . . . Doubtless the show was highly entertaining to the jury, but entertainment of the jury is no function of a trial." *Hadrian et al v. Milwaukee Electric Railway & Transport Co.*, 1 N.W.2d 755, 758 (Wis. 1942).

"The films illustrate, better than words, the impact the injury has had on the plaintiff's life in terms of pain and suffering and loss of enjoyment of life. While the scenes are unpleasant, so is plaintiff's injury." *Grimes v. Employers Mutual Liability Ins. Co.*, 73 F.R.D. 607, 610 (D. Ala. 1977).

"Through the contents of an image and the resources of montage, the cinema has at its disposal a whole arsenal of means whereby to impose its interpretation of an event on the spectator." ANDRE BAZIN, *WHAT IS CINEMA?* 26 (1967).

## INTRODUCTION

Around 1923, Mr. William H. Gibson, a vaudeville performer and also an amputee, sued Basil H. Gunn for injuries Mr. Gibson sustained when hit by Mr. Gunn's car.<sup>1</sup> Prior to the accident, Mr. Gibson performed his act with a prosthetic leg. After the accident, unable to perform, he sued Mr. Gunn for lost pay and pain and suffering. At trial, Mr. Gibson showed the jury a film that had been a part of his act. It showed Mr. Gibson walking down the street on crutches and entering a store to purchase a prosthetic leg. It then showed Mr. Gibson leaving the store with a new leg and Mr. Gibson dancing in the street with friends, Mr. Gibson being the most talented dancer of them all thanks to his new prosthesis.

Due in part to the filmic evidence proffered by Mr. Gibson, the jury found in his favor. Mr. Gunn appealed, arguing that the film was admitted in error. The appellate court agreed, reversing the verdict in a two-paragraph opinion. It explained that "plaintiff's ability as a vaudeville performer was not the issue" in the action for personal injuries and "had no place in the trial in the Supreme Court of the state."<sup>2</sup> Indeed, the court believed the jury verdict in the plaintiff's favor proved the poisoning effect of the film at trial. "The effect of this radical departure from the rules of evidence is found in the excessive verdict

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1. *Gibson v. Gunn*, 202 N.Y.S. 19, 20 (App. Div. 1923).

2. *Id.*

returned by the jury.”<sup>3</sup> The court went on to explain more fully the problem with the filmic evidence:

We think the introduction in evidence, over defendant’s objections and exceptions, of a moving picture of plaintiff’s performance in a vaudeville entertainment prior to the accident in which the injury was sustained, constituted reversible error. Aside from the fact that moving pictures present a fertile field for exaggeration of any emotion or action, and the absence of evidence as to how this particular motion picture film was prepared, we think the picture admitted in evidence brought before the jury irrelevant matter, hearsay and incompetent evidence, and tended to make a farce of the trial.<sup>4</sup>

Eighty years later, the sentiments expressed in *Gibson v. Gunn* regarding film’s effect and role at trial still persist in the common law. The *Gibson* opinion is primarily about the prejudicial effect of the film on the jury verdict. Whether or not relevant, the nature of the film (“farce”) as contrasted with the purpose of the trial (a case of “the issues presented by the pleadings”) misdirected the jury and, thus, says the court, misdirected justice. However terse, *Gibson v. Gunn* sets the stage for the many decisions that follow concerning the use of film as evidence in court.

The *Gibson* court’s first (and concluding) comment concerns the perceived opposite tendencies of film and law, the former being to entertain, provoke, or please, and the latter being to reason and judge based on facts and not on emotion. The dichotomization of these two different ways of worldmaking<sup>5</sup> (through film and through law) remains a hallmark in the case law discussing the evidentiary value of film today.<sup>6</sup> Also, like so many court decisions that will follow, the *Gibson* court characterized the filmic evidence as substantive proof of some event or thing at issue, such that the “testimony” provided by the film should be tested for its verisimilitude and representational integrity through the usual adversarial procedure of cross-examination.<sup>7</sup> As a film, however, it was immune to questioning, unable to talk back, to

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3. *Id.*

4. *Id.*

5. See generally NELSON GOODMAN, *WAYS OF WORLDMAKING* (1978) (offering a polemic on different kinds of “worldmaking” through symbolic systems, such as written, oral, or pictorial language, as related to truth and knowledge).

6. See, e.g., Jennifer L. Mnookin & Nancy West, *Theaters of Proof: Visual Evidence and the Law in Call Northside 777*, 13 *YALE J.L. & HUMAN.* 329, 374 (2001) [hereinafter *Call Northside 777*] (discussing *Gibson v. Gunn* and film as “spectacles”).

7. 202 N.Y.S. at 20.

confirm or deny its content or form. In its presentation of many details and a singular point of view that remained uninterrogated but powerfully experienced by the jury, the film challenged the regulated and controlled evidentiary endeavor of the trial. It was therefore excluded.

Since at least 1923, courts like *Gibson* have been wrestling with the proper use and admissibility of filmic evidence at trial.<sup>8</sup> Filmic evidentiary proffers vary greatly. They include day-in-the-life films of personal injury plaintiffs such as William Gibson, crime scene footage, accident reenactments, and videotaped testimony. After reviewing nearly ninety cases that evaluate filmic evidence, it appears that, despite the ubiquity of these films,<sup>9</sup> the common law nevertheless has failed to promote a coherent evidentiary doctrine governing the use and admissibility of film in the courtroom. This Article seeks to disentangle the doctrine and, by drawing on basic principles in film theory and history, promote a new paradigm for the use and admissibility of filmic evidence in the courtroom.

The incoherence in the common law takes many forms. In the most common type of analysis of filmic evidence, courts simply analyze the film under Federal Rule of Evidence 403, taking into consideration the film's peculiarly "emotional"<sup>10</sup> and "dramatic"<sup>11</sup> effects, balancing its probativeness with its prejudice, and its potential to "dominat[e]"<sup>12</sup> the evidence at trial. This was the tack taken in *Gibson*. These analyses cursorily acknowledge film's difference from other kinds of evidence, but, in most instances (*Gibson* aside), nevertheless admit the film without discussion of how film's difference matters in the context of the trial and the rules of evidence.

Another common judicial analysis of filmic evidence considers more closely the admissibility of filmic evidence by contrasting it with other kinds of evidence, such as photographs, documents, or testimony. These cases say, for example, that "[m]otion pictures are commonly admitted into evidence as form of visual testimony"<sup>13</sup> or

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8. "The very first case involving motion pictures was the Edison copyright litigation . . . [in] 1903." Pierre R. Paradis, *The Celluloid Witness*, 37 U. COLO. L. REV. 235, 235 n.2 (1965).

9. See, e.g., Chilton Davis Varner & James Matheson McGee, *Worth A Thousand Words; The Admissibility of Day-in-the-Life Videos*, 35 TORT & INS. L.J. 175, 175 (Fall 1999) ("Motion pictures or videos in personal injury trials have become almost as commonplace today as the more traditional visual aids of charts, graphs, slides, and still photographs.")

10. *United States v. Merino-Balderramma*, 146 F.3d 758, 763 (9th Cir. 1998).

11. *Commwealth v. Harvey*, 397 Mass. 351, 359 (1986); *Balian v. Gen. Motors Corp.*, 296 A.2d 317, 322 (N.J. Super. Ct. 1972).

12. *Bannister v. Noble*, 812 F.2d 1265, 1269 (10th Cir. 1987).

13. *State v. Young*, 303 A.2d 113, 116 (Me. 1973); see also *United States v. Bernal*, 884 F.2d 1518, 1524 (1st Cir. 1989).

that "the same contours of law that govern the admissibility of . . . audio recording[s] and photographs are to be applied to the question of whether . . . videotape is admissible."<sup>14</sup> Here, film is considered a sum of individual pictures ("moving pictures") and signifies as an individual photograph does, rather than as a mode of communication altogether new and different.<sup>15</sup> This second kind of analysis resembles the common judicial argument by analogy.<sup>16</sup> Whether film can properly be analogized to photographs, testimony, or diagrams, however, remains wholly undeveloped in scholarship or common law. In fact, a significant problem with this analogy is the acknowledgment by courts themselves that filmic evidence is unlike any other kind of trial evidence.<sup>17</sup>

The last and least common kind of judicial analysis of filmic evidence centers on the court's own description of the content of the film and its imagined emotional effect on the jury.<sup>18</sup> The *Gibson* opinion was quite pithy, but some later cases delve deeply into the film's images, describing in detail the content of the film and its imagined effect on the audience. This third category of analysis resembles the trial judge vamping as film critic, but as a film critic who fails to draw on the traditions of film studies to explain how meaning is differently constructed through film than through other communicative media.

This last category of analysis is the most thoughtful in terms of its attention to film as an expressive medium, the interpretation of which differs from that of static images and written or spoken language. Nevertheless, these judicial forays into film criticism result in

14. *United States v. Beeler*, 62 F. Supp. 2d 136, 148 (D. Me. 1999).

15. 2 MCCORMICK ON EVIDENCE § 214 (John William Strong et al. eds., 4th ed. 1992) [hereinafter MCCORMICK]. As one commentator stated, "[N]o motion picture was ever rejected by a court simply because it was a motion picture," as opposed to a still photograph. Still today, film is considered admissible under Federal Rule of Evidence 1001 as a "motion picture," once authenticated as a fair and accurate representation of the thing or event filmed. *See* MCCORMICK § 14; Fed. R. Evid. 1001(2) and Advisory Committee Notes.

16. Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J.L. & HUMAN. 1 (1998) (providing a history of photographic evidence and of the analogic processes through which photography as a new technology was inaugurated into the courtroom); *Call Northside 777*, *supra* note 6, at 375, 383.

17. *See, e.g., Cisarik v. Palos Cmty. Hosp.*, 579 N.E.2d 873, 876 (Ill. 1999) (eschewing the comparison of film to photographs, noting that, "[A]lthough such a film may be used demonstratively, the majority's conclusion that evidence of this type is 'comparable to a still photograph, a graph, a chart, a drawing or a mode' is misleading, if not inaccurate. As defendants observe, the suggested analogy is appealing in its simplicity but fails to acknowledge the powerful and distinctive nature of the evidence.") (dissenting opinion).

18. *Constantino v. Herzog*, 203 F.3d 164 (2d Cir. 2000) (describing video expert treatise portraying certain medically problematic births); *Hinkle v. City of Clarksburg*, 81 F.3d 416 (4th Cir. 1996) (describing computer reenactment of crime scene); *Thomas v. C. G. Tate Constr. Co.*, 465 F. Supp. 566 (D.S.C. 1979) (describing day-in-the-life film); *Foster v. Crawford*, 496 F.2d 788 (3d Cir. 1974) (describing interview with plaintiff).

confusion and inconsistency. For example, in attending to film form, courts describe the graininess of surveillance film footage, its “unintelligible” soundtrack, and the fact that its images are out of focus.<sup>19</sup> This same court then concludes that the film is “helpful” in that it “shows” the defendant participating in the alleged criminal activity, its meaning for the case at hand beyond peradventure.<sup>20</sup> Similarly, some judges explain how day-in-the-life films are staged and scripted for trial, intended to “arouse, intensify and appeal to the jury’s emotions,” and in the same opinion, extol the “informative manner” in which the film presents “the impact the injury has had on plaintiff’s life.”<sup>21</sup>

There is a common tension at the center of these three types of judicial treatment of filmic evidence. On the one hand, courts consider that film is merely illustrative, a visual representation of some other more traditional evidence at trial.<sup>22</sup> It does not stand alone, but necessarily dovetails on some witness’ testimony or a properly admitted documentary proffer. On the other hand, film is perceived as the best evidence of some event or fact and as providing a transparent and uncontestable representation of reality. Although film is frequently admitted in conjunction with some authenticating testimony that confirms the film is what the testifying witness claims,<sup>23</sup> the courts nevertheless describe the film as bringing to life the facts it portrays, adding substance and detail beyond that which the testifying witness can provide.<sup>24</sup>

In disentangling the case law, this Article argues that the tension and incoherence in the common law’s treatment of filmic evidence dating at least from the *Gibson* court’s era stems from the courts’ mis-categorization of film as “demonstrative evidence,” a visual aid that purports merely to illustrate other evidence rather than to be directly

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19. See, e.g., *United States v. Bernal*, 884 F.2d 1518, 1523 (1st Cir. 1989).

20. *Id.* at 1523–24; see also *Beeler*, 62 F. Supp. 2d at 148–49 (finding inaudible and blurry film “enhanced” to be clear; holding enhanced video is “accurate, authentic and trustworthy” evidence for purposes of trial).

21. *Caprara v. Chrysler Corp.*, 423 N.Y.S.2d 694, 689–99 (App. Div. 1979); see also *id.* at 699 (“While the scenes are undoubtedly unpleasant, so too is plaintiff’s injury.”).

22. See, e.g., Fed. R. Evid. 1001, Advisory Committee’s Notes (“[A] witness . . . adopts the picture as his testimony, or . . . uses the picture to illustrate his testimony.”).

23. See, e.g., Fed. R. Evid. 901.

24. These decisions also appear to be based on an instinct about film spectatorship and the viewing audience generally. Rather than instinct, the common law should reflect a basic understanding of the epistemology and heuristics of film, a medium increasingly being mobilized in courts of law around the country. See, e.g., *Varnier & McGee*, *supra* note 9, at 175 (“Motion pictures or videos in personal injury trials have become almost as commonplace today as the more traditional visual aids of charts, graphs, slides, and still photographs.”).

probative of some fact at issue.<sup>25</sup> Strictly speaking, as a demonstrative aid, film cannot assert or speak for itself or otherwise be substantive evidence of some fact at issue.<sup>26</sup> However, once admitted as a demonstrative aid, courts nevertheless describe the film's content in detail and extol the film's informative and helpful qualities.<sup>27</sup> In other words, despite admitting the film as a demonstrative aid, courts consider film for its substantive character and as substantive evidence with independent probative value "adduced for the purpose of proving a fact in issue."<sup>28</sup> Moreover, and perhaps due to the slippery analysis from the demonstrative to substantive evidentiary categories, courts fail to encourage the evaluation of film as substantive evidence, subject to rigorous testing for the truth of its assertions.

This Article will show that, when properly considered, all filmic evidence is substantive and assertive in nature. Films are testimonials that should be evaluated as other substantive proffers in terms of their intention and their expressive qualities—for what they say and how. Where courts admit film as demonstrative but then marshal its meaning toward substantive ends, they are creating more confusion and avoiding paying close attention to film, both as an independent communicative medium and a significant piece of evidence in the particular trial at hand. It is time to uncouple film from the demonstrative category and to develop a methodology for attending to film as substantive evidence for the message it asserts. This will require infusing into the evidentiary doctrine a common sense approach to the interpretation of film that attends to its distinctive signifying practice. While a smattering of articles exist on the use of film at trial, none analyzes and provides a structure for working through the particular problems posed by filmic evidence.<sup>29</sup> This Article will do just that by

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25. See, e.g., *Szeliga v. Gen. Motors Corp.*, 728 F.2d 566, 568 (1st Cir. 1984) (affirming trial court's ruling that probative value of films to "illustrate" testimony of manufacturer's expert outweighed prejudicial effect); *United States v. Bynum*, 567 F.2d 1167, 1171 (1st Cir. 1978) (agreeing "with those courts which have held that . . . film may be admissible as probative evidence in . . . [itself], rather than solely as illustrative evidence to support a witness's testimony . . ." (internal quotations omitted)). Also, shown *infra* Part I(A), what constitutes demonstrative evidence is not at all clear, compounding the problem of evaluating film under that name.

26. See *infra* Part I(A).

27. See, e.g., *Bernal*, 884 F.2d at 1523–24.

28. BLACK'S LAW DICTIONARY 1429 (6th ed. 1990).

29. Professor Mnookin's article tracing the history of photographic evidence is the exception, although, needless to say, it documents the treatment of still pictures, not film. See Mnookin, *supra* note 16. Cf. *Call Northside 777*, *supra* note 6, at 371–87. For more typical examples of the scholarship, see e.g., Gregory P. Joseph, *A Simplified Approach to Computer-Generated Evidence and Animations*, 43 N.Y.L. SCH. L. REV. 875 (1999–2000); V. Bianchini & H. Bass, *A Paradigm for the Authentication of Photographic Evidence in the Digital Age*, 20 T. JEFFERSON L. REV. 303 (Summer 1998); Hampton Dellinger, *Words Are Enough: The Troublesome Use of Photographs, Maps and Other Images in Supreme Court Opinions*, 110 HARV. L. REV. 1704 (1997); Stephen Jeffrey Chapman,



bringing some insights of film theory and history to the legal analysis of filmic evidence.<sup>30</sup>

In so doing, this Article proceeds on two fronts: on the level of doctrine and on the level of the cultural analysis of law. In terms of doctrine, this Article evaluates and critiques the law of evidence in regard to the use of film at trial. Through this analysis, it exposes contradictions created by film's admission as a demonstrative aid and shows that film is substantive evidence that should be admitted and evaluated in terms of the truths it asserts.

In terms of a cultural analysis of law, this Article explores how attention to the contradictions in the case law expose courts' imbedded conceptions about the nature of evidence and the meanings made at trial. Parallels in the process through which meanings are constructed in film and law show how the contradictions in the cases are motivated by two venerable jurisprudential anxieties aiming to differentiate the trial as public spectacle from cinema.

One anxiety is the growing trend toward replacing the traditional testimony of live witnesses in court with communications via video and film technology. This concern was evident in *Gibson*: what happens to the trial process when it no longer is based on the jury's judgment of the integrity of the testifying witness' claims to knowledge about her world and instead is dominated by a film presentation, the authority for which no one can adequately vouch? The other anxiety is the public perception of the trial itself as undisciplined and capricious rather than as controlled and truth-establishing. When film is at the center of

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*America's Least Funny Home Videos: A Critique of the Kephart v. State Authentication Standard for Videotape Evidence*, 3 TEX. WESLEYAN L. REV. 71 (1996); Timothy W. Cerniglia, *Computer-Generated Exhibits—Demonstrative, Substantive or Pedagogical—Their Place in Evidence*, 18 AM. J. TRIAL ADVOC. 1 (1994); David B. Hennes, Comment, *Manufacturing Evidence for Trial: The Prejudicial Implications of Videotaped Crime Scene Reenactments*, 142 U. PA. L. REV. 2125 (1994); Jane A. Kalinski, Note, *Jurors at the Movies: Day-in-the-Life Videos as Effective Evidentiary Tool or Unfairly Prejudicial Device?*, 27 SUFFOLK U. L. REV. 789 (1993); Marc A. Ellenbogen, Note, *Lights, Camera, Action: Computer-Animated Evidence Gets Its Day In Court*, 34 B.C. L. REV. 1087 (1993); Tricia E. Habert, Comment, *"Day in the Life" and Surveillance Videos: Discovery of Videotaped Evidence in Personal Injury Suits*, 97 DICK. L. REV. 305 (1993); Sharon Panian, *Truth, Lies, and Videotape: Are Current Federal Rules of Evidence Adequate?*, 21 SW. U. L. REV. 1199 (1992).

30. The case law's inconsistent treatment of filmic evidence providing little to no analysis of how meaning is constructed through film at trial should perplex even the fledgling film scholar and worry those who care about the consistency of evidentiary rulings and development of a common law based not on instinct but on traditions of knowledge and experience. Despite a *nisi prius* court's role in weighing and sifting a multitude of evidence in light of fairly extensive case law to precisely state the varied ways evidence can and should be considered, when it comes to the treatment of filmic evidence, these same courts fail to draw the nuanced distinctions that are the hallmark of the common law. The absence of film analysis is all the more troubling given the ubiquity of the use of film in court and its popularized viewing norms that remain unspoken (whether challenged or accepted) by the trial's referees.

the trial, courts appear to go to great lengths to narrate the trial evidence (and to narrate the film that forms part of the trial's story). The courts' self-conscious control of the story being told—both through film and at law—imagines the trial and its embodiment of legal reasoning as requiring their strong interpretation. Does this imagine the trial, like a film, as a public spectacle and a representative endeavor that proliferates rather than contains meaning? Does this suggest the proper function of the judge is to contain this proliferation, to control the meanings made at law and through film? Would this function effectively preserve the reputation of the trial as the authoritative process from which the truth of the matter emerges, a puzzle tending fairly toward a revelation of who did it and how?<sup>31</sup>

Part I of this Article surveys the filmic evidentiary doctrine from 1923 to the present. It proceeds, first, by describing the history of the distinction between demonstrative and substantive evidence. Then, it analyzes the case law relating to this doctrine in terms of two broader categories (*i.e.*, genres) of filmic evidence: *evidence verité*, films that purport to be unmediated and unselfconscious film footage of actual events; and staged-and-scripted films, such as day-in-the-life films, accident reenactments, and expert demonstrations, that are frequently rehearsed and edited and that are made with the trial in mind. This Part highlights the contradictions in the case law in light of these genres of filmic evidence. It will also deduce possible reasons for these contradictions—the jurisprudential anxieties mentioned above—and raise the possibility of a better, more consistent approach for the use and admissibility of film that can lessen the concerns present in the case law.

Part II provides an overview of some basic tenets of film hermeneutics that date from the birth of cinema in 1894. This Part shows how the history of moving pictures as an art and a discipline can contribute to evidence law and in particular to the law governing the use and admissibility of filmic evidence in court. From this history will develop two important concepts in film theory frequently mobilized to explain how meaning is made through film (and consequently how it should be perceived to be made at law): (1) the film camera's constitution of its viewer as eyewitness; and (2) the self-conscious play of film form that both reveals and obfuscates the film's interpretation of the event or circumstance at issue.

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31. Admittedly, these are loaded questions, as yet another aim of this Article is to show how filmic representations and the performances that collectively make up the trial are mutually constitutive and share linguistic, imagistic, and dramatic signifying practices. See *infra* Part III.

Part III revisits the case law described in Part I through the lens of film theory discussed in Part II. In so doing, this last Part accomplishes two tasks. It demonstrates the salutary effects of evaluating filmic evidence as substantive evidence for the truths it asserts, both in terms of the specific cases described and in the common law doctrine more generally. This last Part also shows how evaluating filmic evidence from the perspective of film theory as described in Part II assuages the jurisprudential anxieties identified throughout. The increasing use of film in court does not contaminate the trial process or tarnish its reputation for fair and impartial adjudication. To the contrary, subjecting filmic evidence to the same rigorous treatment as other substantive evidence reaffirms the importance of balanced advocacy in the context of judgments. It also aligns the trial function with the court's perceived ideal: as promising an evenhanded and honest public process through which to adjudicate disputes and condemn legislatively-determined bad acts.

## PART I. CURRENT DOCTRINE AND CASE LAW

### *A. The Historical Distinction Between Demonstrative and Substantive Evidence*

The category of demonstrative evidence remains an ill-defined one. As Robert Brain and Daniel Broderick have noted, there are only two references to demonstrative evidence in the Federal Rules, and those references occur in the Advisory Committee notes rather than in the text of the rules.<sup>32</sup> Demonstrative evidence is therefore most often identifiable in its difference from other kinds of evidentiary proffers.

As opposed to real evidence, which involves proof by tangible things directly involved in the transaction or events in litigation, demonstrative evidence is created for illustrative purposes, and often for use at trial, such as diagrams and models.<sup>33</sup> Unlike real evidence, demonstrative evidence plays no role in the events giving rise to the lawsuit. In relation to substantive evidence, the most common forms of which are testimony and documentary evidence, demonstrative evidence is not independently probative of some fact at issue at trial.<sup>34</sup> Black's Law Dictionary describes demonstrative evidence as evidence

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32. Robert D. Brain & Daniel J. Broderick, *The Derivative Relevance of Demonstrative Evidence: Charting its Proper Evidentiary Status*, 25 U.C. DAVIS L. REV. 957, 1015 & n.190 (1992).

33. *Id.* at 980 (defining real evidence).

34. *Id.* at 968-69.

“addressed directly to the senses without intervention of testimony. Such evidence . . . [that] illustrate[s] some verbal testimony and has no probative value in itself.”<sup>35</sup> In contrast to testimonial or documentary evidence, demonstrative evidence is “principally used to illustrate or explain other testimonial, documentary or real proof, or judicially noticed fact. It is, in short, a visual (or other) sensory aid.”<sup>36</sup> A diagram of the scene of a crime drawn on a board by a percipient witness who is present at trial to testify would be classic demonstrative evidence. Whereas the diagram illustrates the witness’ testimony, it should, technically speaking, add nothing further. In this way and despite its title as “evidence,” demonstrative evidence is more of a visual aid than evidence *per se* because it merely illustrates or “demonstrate[s]” a witness’ testimony.<sup>37</sup>

Looking to other traditional sources, the category of demonstrative evidence becomes less clear. Melvin Belli, in his many writings on trial practice, described demonstrative evidence broadly. “[D]emonstrative evidence is anything which appeals to the jurors’ senses. . . . [It] is premised upon the theory that it is easier and much more effective simply to show the jurors what is being described, rather than to waste time and to risk possible confusion by relying solely upon oral testimony.”<sup>38</sup> Belli suggests that demonstrative evidence might be explanatory in a way that adds something to the substance of the testimony. Along these same lines, Dean McCormick described demonstrative evidence as including “all phenomena which can convey a relevant firsthand sense impression to the trier of fact, as opposed to those which serve merely to report the secondhand sense impressions of others.”<sup>39</sup> McCormick’s definition of demonstrative evidence appears to “reject . . . the notion that any exhibit can have a purely demonstrative or illustrative use.”<sup>40</sup> Indeed, Brain and Broderick have written that McCormick’s treatise on evidence published in 1940 began “the modern era of demonstrative evidence” and with it created the muddle in the case law.<sup>41</sup>

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35. BLACK’S LAW DICTIONARY 432 (6th ed. 1990).

36. Brain & Broderick, *supra* note 32, at 968–69.

37. “Prior to the advent of the photograph, drawings maps and models, unless they were officially sanctioned, were not conceptualized as evidence; they were thought of as merely illustrative.” Mnookin, *supra* note 16, at 64.

38. Melvin Belli, *Demonstrative Evidence: Seeing is Believing*, 16 TRIAL 70 (July 1980).

39. MCCORMICK, *supra* note 15, § 212 at 3.

40. Brain & Broderick, *supra* note 32, at 1006.

41. Brain & Broderick, *supra* note 32. *Id.* at 1004–05. As one example of the confusion, Brain and Broderick point out that “McCormick viewed the distinction between real and demonstrative evidence as only a quantitative variation in the amount of probative value between the two groups. There was no acknowledgement of any qualitative difference between the two types

As Brain and Broderick explain, the primary confusion concerns the relevance of demonstrative evidence. They explain this confusion as based on a misunderstanding of demonstrative evidence as a subset of real evidence or substantive evidence.

It is true that demonstrative and real evidence share an attribute: namely, that a proffered exhibit of each type gives the trier of fact a first-hand impression of the information it contains. Nevertheless, demonstrative evidence and real evidence are quite different in their proffered use at trial. Real evidence is used to help prove directly the existence of a fact of consequence in the action, whereas demonstrative proof is only offered derivatively, to help explain other admissible evidence.<sup>42</sup>

They provide an example of this important point: “[A] diagram of an apartment that has been burglarized does not, in and of itself, make it any more or less probable that the defendant was the one who committed the crime.”<sup>43</sup> The same logic can be applied to a film of the post-burglarized crime scene; the film of the apartment does not, by itself, make it any more or less likely that the accused is guilty of the burglary.<sup>44</sup>

Despite its historical difference from real and substantive evidence, demonstrative aids, such as maps, drawings, photographs, and film, after testing for prejudice, are routinely admitted into evidence under Federal Rule of Evidence 401.<sup>45</sup> This presumes the evidence is substantive proof, in that it tends “to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>46</sup> As Jennifer Mnookin has explained,

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of evidence.” *Id.* at 1007. For an overview of the confusion in the case law, see Brain & Broderick *supra* note 32, at 959–68, and Mnookin, *supra* note 16, at 69–70.

42. Brain & Broderick, *supra* note 32, at n.7.

43. *Id.*

44. “Unlike substantive evidence, demonstrative evidence does not, by itself prove the apparent existence or nonexistence of any material fact. It has no independent probative value. Demonstrative evidence only illustrates or clarifies other substantive evidence. Thus, it is entirely derivative of other evidence, and its only value at trial is when it is linked to other substantive proof.” *Id.* at 973.

45. Joseph M. Herlihy, Note, *Beyond Words: The Evidentiary Status of “Day in the Life Films”*, 66 B.U. L. REV. 133, 140–41 (1986) (discussing cases weighing filmic proffers under a Rule 403 balancing test, presuming relevance).

46. Fed. R. Evid. 401; see also BLACK’S LAW DICTIONARY 1429 (6th ed. 1990) (defining substantive evidence as that which is “adduced for the purpose of proving a fact at issue”).

[I]t is only with the advent of photography that the use of . . . other representational forms came to be viewed as worthy of contestation and appeal. . . . Maps, models, drawings, and diagrams were carried into the courtroom on the photograph's coattails. Once the general category was established, all of these representational forms began to be understood in evidentiary terms.<sup>47</sup>

The risk of blurring the demonstrative aid with a substantive evidentiary proffer heightens when film and photographic evidence are introduced at trial, as both film and photographs construct meaning by indexing real life. Dovetailing on McCormick's expansive definition of demonstrative evidence, and in regard to filmic evidence specifically, one commentator has written of the blurring of film's demonstrative qualities with its substantive ones:

[F]ilm is neither simple 'visual testimony' nor a tangible object that actually played a role in the event. Thus a film is on the one hand an illustration, a gloss capable of distortion, yet on the other hand an object that, although it plays no role in the event, offers a trace of intrinsic probative value.<sup>48</sup>

Mnookin has traced the confusion between demonstrative and real evidence to the introduction of photographs into court. She explains that, despite the new category (as of the early 1900s) of "demonstrative evidence," photography "hovered uncomfortably on the boundary between illustration and proof."<sup>49</sup> This split identity foreshadowed the unworkable case law of today concerning the evidentiary value of film.<sup>50</sup>

Despite its expanding definition, a crucial distinction between demonstrative and substantive evidence is the latter's testing in the trial process.<sup>51</sup> With any substantive evidence (documentary or testimonial), its author, owner, or witness is put before the jury to be judged,

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47. Mnookin, *supra* note 16, at 63–64.

48. Herlihy, *supra* note 45, at 148.

49. Mnookin, *supra* note 16, at 65.

50. Mnookin hints at the confusing state of the doctrine in her conclusion when she notes that the competition between the notion of "illustrative evidence" and the photograph as the "silent witness" has "not been—and probably cannot be—fully reconciled. . . . But judges and lawyers have muddled along; the conceptual confusion has not often hindered actual practice. This is not to suggest that the formal doctrine matters not at all, but rather that evidentiary practices can be made to work even when incompletely theorized." Mnookin, *supra* note 16, at 73.

51. Another practical distinction is that demonstrative evidence does not typically get sent to the jury room with the substantive and real evidence.

and the jury is asked to evaluate the evidence's weight and meaning in light of the witness's credibility. With demonstrative evidence, by contrast, the jury is not instructed to judge the "author" of the film, photograph, or drawing. Nor are jurors told it is their job to interpret the presentation of demonstrative evidence as they would with the testimony of a witness or with a document's content (in the case of some ambiguity). Instead, the percipient witness through whom the demonstrative aid was introduced is interrogated, leaving her drawing or her film uncontested.<sup>52</sup>

This would be unproblematic were it not for the fact that many demonstrative aids—and especially filmic proffers—are routinely admitted as demonstrative aids and then are weighed and considered by courts and juries as if they were offered as substantive proof of a material fact.<sup>53</sup> In the case of crime scene footage, for example, the film is said to "clarify" and "illustrate" events in lieu of the testifying witness who is nevertheless present to explain what he or she saw.<sup>54</sup> In the case of film that lacks an authenticating witness, such as an automatic surveillance film, film is admitted as independent evidence to "speak for itself," under circumstances guaranteeing reliability, despite the obvious hearsay problems.<sup>55</sup> With day-in-the-life films and expert demonstrations, courts consider these films to be "revelatory" and "transparent," even if created well after the incident in question and even if self-consciously made for the purpose of trial from a singular perspective of a person at one point in time.<sup>56</sup> Maintaining the label of "demonstrative evidence," these filmic proffers nevertheless shed their dependence on their source and are thought to "clarify" or "speak for [themselves]" absent the testing and interrogation that is usual (and necessary) for the admission into evidence of substantive proffers.<sup>57</sup>

Where the analogy to maps and drawings may have helped inaugurate photography into the courtroom and into the realm of evidence

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52. See *infra* note 57.

53. Herlihy, *supra* note 45, at 140–41, 148–50; Brain & Broderick, *supra* note 32, at 1009 (criticizing the modern approach to demonstrative evidence that includes the real, documentary, and illustrative under the same heading).

54. See *infra* Part I(B)(1).

55. See *infra* Part I(B)(2)(b).

56. See *infra* Part I(C).

57. To be sure, demonstrative evidence is subject to some scrutiny, but generally this amounts only to satisfying the court that the demonstrative aid fairly and accurately depicts the matter in question. As will be shown in Part I(B)'s discussion of the case law at length, whether the film is a fair and accurate depiction of the matter in question is an entirely circular enterprise, as most controversial demonstrative aids are films purporting to show the event to be adjudicated. Whether those films fairly and accurately depict the matter in question is tantamount to asking whether the film accurately reflects what actually happened, which determination is ostensibly for the jury to decide and the reason for the trial in the first place.

and proof, the category of evidence that emerged—so-called “demonstrative”—does little to unpack the confusion in the case law regarding how film should be understood as evidence.<sup>58</sup> There is a whole field of study devoted to the filmic medium that could reduce the ambiguity in the analysis of filmic evidence in terms of its methodological approach to film interpretation as a way of knowing and worldmaking and, of course, of judging, which is what law, and trial law specifically, seeks to accomplish.<sup>59</sup>

As described in more detail below, *infra* Part II, one basic approach of film theory would be to decouple seeing with knowing in favor of a hermeneutics of form.<sup>60</sup> For the purposes of Part I(B) that immediately follows, however, courts’ contradictory treatment of filmic evidence as both demonstrative, for the purpose of admissibility, and also as substantive, for the purpose of the film’s relevance and role in the trial process is discussed. These contradictions reveal the unworkable distinction between demonstrative and substantive as regards filmic proffers and suggest the need for a new paradigm for the admissibility and treatment of film at trial. They also expose inherent anxieties about the function of the trial and about the increasing substitution of live witnesses with film testimonials.

### B. Evidence Verité

This Section examines one kind of filmic evidence called, for the purposes of this article, *evidence verité*,<sup>61</sup> filmic evidence that purports to be unmediated and unselfconscious film footage of actual events.

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58. Mnookin considers the “instability of the epistemic category [of demonstrative evidence] . . . the ultimate result of the judicial analogy between photography and hand-drawn images.” Mnookin, *supra* note 16, at 70. Whether or not the case (although there is no apparent reason to disagree with Mnookin’s history of photographic evidence), it seems the demonstrative category is no longer meaningful.

59. Mnookin says that her study of “analogic reasoning suggests that in practice, we—as jurors, judges, lawyers, and participants in legal culture—may be able to tolerate a good deal of ambiguity in our construction legal concepts.” Mnookin, *supra* note 16, at 71. This is possible except that ambiguity is unnecessary in this context given the light that film theory can shed on the common law of filmic evidence.

60. See discussion *infra* at Part II and accompanying notes.

61. The author derives this term from “*cinéma vérité*,” a “stylistic movement in documentary filmmaking, and a term often applied to a fictional film that presents drama in a candid, documentary-like manner. . . . *Cinéma vérité*, meaning ‘cinema truth,’ attempts to avoid the slick, controlled look of studio pictures. . . . The documentaries of Frederick Wiseman have been described as *cinéma vérité* films because of their starkly naturalistic photographic styles.” FRANK BEAVER, *DICTIONARY OF FILM TERMS: THE AESTHETIC COMPANION TO FILM ANALYSIS* 66–67 (1994).



This kind of evidence can be surveillance footage shot by undercover agents on a stake-out or a private investigator's film of a personal injury victim to be used later to impeach testimony concerning the extent of his or her injuries. A common (although infrequently debated) kind of *evidence verité* is after-the-fact crime scene footage taken by an officer for investigative and adjudicative purposes. Most *evidence verité* consists of films of violent crimes and so are described as gruesome and inflammatory, tending to move the debate in the case law toward a Rule 403 analysis. This pull toward Rule 403 skips the preliminary step of asking what kind of evidence the film is. It assumes, without any analytic support, that the film is substantive evidence of the crime or tort. Most often, however, these filmic proffers are admitted as demonstrative aids, not as substantive evidence (which would then be subject to hearsay objections, for example), signaling the underlying confusion in the status, value, and meaning of the film for the trial at hand.

The examples that follow illustrate two important points about courts' mishandling of *evidence verité*. First, most cases unconsciously justify the slippage between demonstrative and substantive categories of evidence by describing the film as transparent, thereby cloaking the film with an objective status. These courts suggest that, whatever the evidentiary category, the film's meaning, and the information it portrays, is unbiased. Here, courts avoid the specter of admitting assertive evidence (the filmic proffer) that lacks a credible or testable source (a testifying witness, for example) by declaring the filmic representation *per se* credible and evenhanded.<sup>62</sup> Because statements offered for their truth are inadmissible absent an applicable hearsay exception, courts tend to hide behind the demonstrative label when performing as evidentiary gatekeeper. Packaging the admissibility ruling this way avoids the criticism that the filmic proffer evinces a point of view or denotes facts and information that a live witness cannot corroborate.<sup>63</sup>

Second, in addition to hiding behind the ostensibly demonstrative and objective qualities of these filmic proffers, courts justify the film's admission into evidence by declaring the film's meaning unambigu-

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62. As will be shown *infra*, however, these films are argumentative and assertive. Far from impartial, impersonal, and unmediated, these kinds of filmic proffers are testimonial in nature.

63. The rare occasions when courts exclude *evidence verité* prove this point. In these cases, *evidence verité* films are ruled inadmissible because courts recognize the film has a point of view, an opinionated content. See, e.g., *French v. City of Springfield*, 357 N.E.2d 438 (Ill. 1976) (holding film of area in which accident occurred inadmissible because it preconditioned the minds of the jury to accept plaintiff's theory above all else). In these circumstances, the film's perceived singular perspective suddenly becomes troublesome. Courts will exclude film on this basis rather than recognize the testimonial character of *all* film and admit it subject to cross-examination and further technological scrutiny.

ous and the trial verdict uncontroversial. When courts ascertain a risk that the film will be speaking without the authority of a live witness to corroborate or test its details (through cross-examination, for example), courts compensate with their *own* interpretation of the film, announcing its obvious meaning and manifest relevance for the case at hand. They often do so with an imperious narration of “what happened” during the crime, in the film, and at trial. The courts imply that the right result at trial is so obvious that whatever minor ambiguity or uncertainty may exist in the film’s meaning is immaterial. This is an unsubtle attempt at counteracting what film theory (and film goers) understand to be the pleasure and peril of cinema: its combined sense of immediacy and vitality with its underlying fiction and theatricality.<sup>64</sup> Examples follow.

1. *After-the-Fact Crime Scene Footage*

a. *The Bird Men*—In the mid-1980s, the United States brought a criminal action against Marvin Carpenter for violation of the Migratory Bird Treaty Act.<sup>65</sup> Mr. Carpenter was a goldfish farmer, who, by 1988, had approximately 450 acres of ponds breeding nearly two million goldfish per month.<sup>66</sup> Presumably, the ponds were exposed to the open air because wild birds, such as egrets and herons, were a problem for Mr. Carpenter, so much of a problem that Mr. Carpenter hired “birdmen” to kill the wild birds that preyed on his goldfish crop.<sup>67</sup> It was estimated by the federal marshals that, between 1983 and 1988, Mr. Carpenter’s birdmen shot off over 60,000 rounds of ammunition, illegally killing thousands of migratory birds in violation of the Act.<sup>68</sup> Mr. Carpenter was convicted and his appeal was based in part on the admission into evidence by the government of inflammatory crime scene footage of what was termed the “bird pits.”<sup>69</sup>

In execution of a search warrant, federal marshals filmed the unearthing of these “bird pits” in which the bodies of the killed birds were buried by Carpenter’s birdmen.<sup>70</sup> “The video also showed bird carcasses in an incinerator which Carpenter had built to dispose of the birds. The videotape lasted one and one half hours.”<sup>71</sup> As described, the video was undoubtedly gruesome. It showed dead bird carcasses, decomposed bird remains, bird feathers, and charred bird

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64. See *infra* Part II.

65. United States v. Carpenter, 933 F.2d 748 (9th Cir. 1991).

66. *Id.* at 749.

67. *Id.* at 750.

68. *Id.*

69. *Id.* at 751.

70. *Id.* at 751.

71. *Id.*

parts.<sup>72</sup> Defendant properly complained at trial that the video's probative value was outweighed by its prejudicial effect. The trial court, however, disagreed.

In affirming the trial court, the appeals court adopted the government's position that the crime scene footage was admissible because it "*explain[ed] the testimony of the agents who executed the search warrant and . . . tend[ed] to refute the defendants' primary defense that only a few hundred birds had been killed over the five years covered by the indictment.*"<sup>73</sup> Moreover, the appellate court seemed persuaded that the "level of gruesomeness [of the bird pits] did not reach that found in photographs of human victims of homicide," photographs which are admitted in other cases without question.<sup>74</sup>

Here, the federal appeals court did several things that have become fairly common rhetorical moves in the body of case law concerning this kind of filmic evidence. The court considered the videotaped evidence of the crime scene to be cumulative of admissible testimony, *i.e.* contending that the film footage merely repeats and affirms a witness' testimony, and thus deems the footage at worst corroborative. Also, the court compared the crime scene video to photographic evidence that it considered just as inflammatory as the video, which photographic evidence is admitted at trial as a matter of course.

Describing the videotaped evidence as merely cumulative is disingenuous. Cumulativity is most often a basis of exclusion; here, it appears to be the justification for admission. If the videotaped evidence is mere repetition, why put it before the jury, especially in light of its admittedly gruesome and inflammatory nature? And, if cumulative and inflammatory, why admit it in light of the proffer of live testimony to describe the same scene? The emphasis on video's "gruesomeness" suggests that the photographs and the federal marshal's oral testimony of the very same details of the bird pits and charred bird remains were not equally "gruesome." The court failed to describe what the film adds and how it differs from other evidence at trial. By emphasizing the video's cumulative (and therefore at worst corroborative) effects, the court avoids any explicit or careful analysis of the videotaped evidence for its difference from the photographic and oral testimony.

There are hints of what the court really thought when it defended the videotape as explanatory.<sup>75</sup> The court intimates that the crime

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72. *Id.*

73. *Id.* (emphasis added).

74. *Id.*

75. *Id.* (justifying the tape as "explaining the testimony of the agents who executed the search warrant").

scene footage does more than corroborate the federal marshal's testimony; it *clarifies*. Is it, therefore, a species of demonstrative evidence, "illustrating or clarifying . . . previously admitted . . . evidence . . . [without any] independent effect on the determination of the existence of a fact of consequence?"<sup>76</sup> Or, to the contrary, is it substantive evidence with independent probative value, "adduced for the purpose of proving a fact at issue?"<sup>77</sup> The implication from the court's language is that the videotape conveys information more clearly to the jury than does the testimony; it provides more or better details of the crime scene and, hence, is more or better evidence of the event that must be adjudicated. Importantly, by affirming the lower court's ruling, the appeals court decided that this additional value of the videotape as compared to the oral testimony does not taint the jury's role; the videotape's gruesomeness is not more prejudicial or inflammatory than it is probative. Unfortunately, the court failed to explain how the crime scene footage explains and details more of the facts at issue than the agent's testimony. As such, the purported helpful (and presumably unique) qualities of the filmic evidence went unexamined. Readers are left only with the conclusion that the court considers these unnamed qualities good, as opposed to prejudicial, for the adjudication process. In other words, all we know from the court's affirmation of the admissibility of filmic evidence is that the court believes that these gruesome details support the guilty verdict.

The court's sidestep from the demonstrative to the substantive category is particularly troubling given that it appears the appeals court would have ruled differently had it been in the trial court's shoes, but that, because any error was harmless, the decision below is affirmed.<sup>78</sup> The impression left after reading *Carpenter* is that the appeals court's evaluation of the filmic evidence comes after it believes the weight of the evidence points unmistakably to guilt. By the time the *Carpenter* court considered the propriety of the filmic evidence, the import of the film's meaning—what it shows and how it is guessed to have influenced the jury—is a foregone conclusion in light of the description of the overwhelming evidence in favor of the verdict. In the fourth paragraph of the opinion, the court shares the fact that the defendant "conceded there had been a 'massacre.'"<sup>79</sup> Then, using the passive voice, the Court explained that the "evidence of the lethal

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76. Brain & Broderick, *supra* note 32, at 965.

77. BLACK'S LAW DICTIONARY 1429 (6th ed. 1990).

78. *Carpenter*, 933 F.2d at 751 ("Discretion—to admit evidence means freedom to reach a result an appellate court might not reach. We cannot say that the district court abused its discretion.")

79. *Id.* at 750.

'birdmen,' . . . indicated that thousands of birds were dispatched each year by shooting, poisoning or trapping. Most of the birds either decomposed in the ponds, were buried in pits, or were burned in an incinerator."<sup>80</sup> From the outset of the opinion, then, the Court indicates that there is no question that Marvin Carpenter is guilty of violating the Migratory Bird Treaty Act. When the Court eventually reviewed the evidentiary rulings at trial, the defendant's challenge to the admissibility of the prejudicial evidence against him has no force. By merely repeating the language used at the beginning of the opinion to describe what the video showed, there can be no other conclusion but that the film was icing on the cake at trial: all evidence showed that Mr. Carpenter orchestrated the violent and brutal killing of thousands of endangered birds in violation of federal law. In this way, whatever the many meanings the film could have had to its varied audiences, the court's conclusion as to the film's influence on the verdict (and any error in the admissibility ruling) is unaffected. The court concluded that this film did not distort the trial process but, instead, verified its outcome. The court could only reach this conclusion, however, by believing that the film signifies in consonance with the rest of the evidence at trial, and that, somehow, unlike other forms of substantive evidence that appear to lock the verdict in the prosecution's favor, the film requires no testing for its trustworthiness or its point of view.

One might ask whether it matters if the film was questioned and tested as a witness might have been. Would the result of the trial have been any different? Presumably, the court's harmless error analysis answers that question no. Truthfully, it is hard to know, given the assumptions embedded in the court's analysis about the value of the film as evidence and film's presumed indexical relation to the event in dispute.<sup>81</sup> Even if the jury had convicted Marvin Carpenter, however, at least the film would have been perceived consistently and correctly as a substantive proffer subject to close scrutiny rather than as the last word on the subject and almost entirely uncontested. For the most part, at trial, judges are evidentiary referees—the so-called gatekeepers of evidence, making sure the game is played fairly. When, as here, judges become assessors of the evidence, evaluating the evidence for its truth and its meaning, the game has fundamentally changed.

*b. The Murder of Barbara Cromwell*—Consider the case of the murder of Barbara Cromwell. In it, the government of the United States Virgin Islands prosecuted and convicted fifteen-year-old Nicholas

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80. *Id.*

81. *See infra* Part II(A).

Albert for conspiracy to commit burglary and for the murder of Barbara Cromwell in her vacation condominium in St. Croix.<sup>82</sup> The bulk of the evidence at trial was: (1) Albert's own statement, pointing the finger at his friend Johnny Kidd; (2) police testimony; (3) twenty-four color photographs of the crime scene and victim; and (4) a forty-seven minute long videotape of the crime scene showing Barbara Cromwell, bloody and lifeless on her bed.<sup>83</sup> On appeal, the defendant contended that the graphic crime scene footage was more prejudicial than probative and was the substantial cause of the verdict against him.<sup>84</sup> Like the court in the case against Marvin Carpenter and his birdmen, the videotape here was described as "gruesome" but not more gruesome than the 24 color photographs admitted into evidence.<sup>85</sup> Like *Carpenter*, the videotape of the murder scene was admitted despite its cumulative content.<sup>86</sup> Also, like the court in the *Carpenter* case, the videotape was heralded as explanatory in that it "assist[ed] the jury in understanding the facts of the case."<sup>87</sup> In this case, however, the court described in more detail the film narrative, exposing to a greater extent the contradictory reasoning (and the jurisprudential anxieties) underlying the admission of filmic evidence.

By all accounts, the murder of Barbara Cromwell was a burglary gone wrong. Two young boys entered what they thought was an empty seasonal condominium and, when they learned that it was not empty, they killed the inhabitant. After stabbing Barbara Cromwell more than twelve times, the defendants allegedly tied her to the bed and, in order to deflect attention from the burglary, they staged a sex crime by flinging Ms. Cromwell's legs open, hiking up her nightgown, and throwing a pornographic video on the bed.<sup>88</sup> The video of the crime scene "included a detailed look at Cromwell's partially naked body tied to the bed with the neck wound revealed."<sup>89</sup> Other details were images of a "blood soaked" bed and "concentration on Cromwell's lower body . . . for approximately 12–15 minutes."<sup>90</sup> The videotape was narrated by the filming police officer.<sup>91</sup> In addition to the videotape

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82. Gov't of the Virgin Islands v. Albert, 241 F.3d 344 (3d Cir. 2001).

83. 241 F.3d at 347–48.

84. *Id.* at 347.

85. *Id.* at 349.

86. *Id.*

87. *Id.* at 348; *see also id.* at 349 ("The videotape was clearly relevant to *demonstrate* the government's theory that one small man could have subdued a struggling Cromwell and have inflicted the massive injuries upon her unassisted." (emphasis added)).

88. *Id.* at 346.

89. *Id.*

90. *Id.* at 349.

91. *Id.* at 348.

and still photographs, the prosecution offered extensive testimonial evidence of the attending police officers concerning the very same crime scene to build the case against the fifteen-year-old Nicholas Albert.<sup>92</sup>

The trial court allowed into evidence the crime scene footage as well as all of the photographs, but required that the videotape be silenced due to its “opinionated narration” by the police officer who filmed the video.<sup>93</sup> In ruling on the film’s admissibility, the trial court reasoned that the videotape, though gruesome, was relevant to bolster the government’s theory of the case and to show the details of the apartment, its condition, the victim and how she looked when found, as well as to assist the jury in understanding the facts of the case generally.<sup>94</sup> In essence, the trial court and the appellate court (in affirmance) conceded that the videotape was cumulative of the photographs but “not so inflammatory that its evidentiary value [was] dwarfed by its graphic depictions.”<sup>95</sup> On the one hand, the court relies on the so-called cumulative nature of the film as the reason the film is not any more gruesome than the photographs. On the other hand, the court acknowledges that the film adds something more than the photographs to the jury’s deliberation (without saying what more) such that the video is not merely corroborative of already similarly detailed and gruesome evidence. The first justification fairly explains the filmic proffer as demonstrative evidence, while the second one suggests the film is testimonial or substantive evidence of some kind, but fails to explain the basis for admitting an out of court statement for the facts and truth it asserts. The court continued to blur these two justifications, suggesting, perhaps, that their differences do not matter here.

Whereas the court conceded that the videotape helped the jury in some way the photographs do not, the one obvious difference between the videotape and the photographs—the video’s contemporaneous narration describing the images depicted—was explicitly excluded from the jury’s purview. Several questions arise from this supposedly curative and limited suppression. One is whether there remains any significant difference between the video and the twenty-four color photographs preventing the video from being entirely cumulative. Another concerns the support for the court’s reasoning when it suggests that muting the video’s volume clears it of any “opinionated” content, and hence any need to test its

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92. *Id.* at 347.

93. *Id.* at 348 (citation omitted).

94. *Id.*

95. *Id.*

testimony with traditional trial procedures.<sup>96</sup> By failing to address these questions or to encourage the probing of the film for its substantive and assertive content, the court implies that the film—whatever its message—does not change what was already a correct result at trial. It also encourages the conflation of the film with an eyewitness status, suggesting to lower courts and to juries that, having excised the “opinionated content” from the filmic evidence, the crime scene footage has been sufficiently sanitized for the jury to consider it as the definitive account of what happened to Barbara Cromwell. If this is the case, what is the trial for?

## 2. *Surveillance Films*

a. *Presidential Campaigns*—The explanation that film is unmediated and thus deserves the same status as eyewitness testimony arises most often in discussions about the admissibility of automated or non-investigatory surveillance film. For example, in 1981, Esmerejidado Guerrero was tried and convicted under section 351(e) of 18 U.S.C. for assaulting a member of Congress, to wit, throwing eggs at Congressman John Anderson while he was campaigning for president.<sup>97</sup> On August 5, 1980, when leaving his campaign headquarters in Denver, Colorado, Congressman Anderson was hit by one of two eggs thrown from a crowd outside his offices. Secret service men chased the attackers and apprehended two suspects, one of which was Guerrero. As is often the case with presidential candidates, news cameras followed him on the campaign trail. One news camera happened to catch some of the egg throwing, but not Guerrero, on film. At trial, the prosecution admitted into evidence news footage of the egg throwing. On appeal from Guerrero’s conviction, based in large part on the admission of the film at trial, the appeals court concluded that this fortuitous filming left “no dispute” about the incident itself.<sup>98</sup>

When evaluating whether the trial court erred in showing the news footage to the jury, the court of appeals explained that the filmic evidence was played without sound and failed to show the defendant perpetrating the act. In fact, the court acknowledged that the film shows merely the eggs coming from the defendant’s direction (a crowd of people) and the defendant being chased by plainclothes officers.<sup>99</sup> Rejecting the defendant-appellant’s objection to the film as prejudicial because it failed to identify him as the perpetrator of the

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96. *Id.*

97. *United States v. Guerrero*, 667 F.2d 862, 864 (10th Cir. 1982).

98. *Id.*

99. *Id.* at 865.



crime, the appeals court affirmed the trial court's ruling admitting the filmic evidence.

In a criminal prosecution, much of the evidence is prejudicial to the defendant, but that does not rule it out if it is relevant and competent. The appellate court determined the film "competent" in its entirety because it was a "motion picture" depiction of the "commission of the crime."<sup>100</sup> The court goes no further than this cursory and conclusory declaration of film's transparent relevance. The film is the last and best word on what happened between John Anderson, Mr. Guerrero, and two eggs in Denver on August 5, 1980.<sup>101</sup> It "is the answer to a prosecutor's dream, to have such evidence as this."<sup>102</sup> What, exactly, does this mean?

Under these circumstances, statements such as this one mean both that (i) the film of the crime is the best evidence of defendant's guilt and (ii), whether guilty or not, the film will assure the defendant's conviction. Surveillance film is considered so authoritative, despite the frequent absence of a corroborating witness, that analyses of this type of filmic evidence are frequently the most conclusory. In these cases, the camera replaces the eyewitness and yet the court fails to encourage the kind of probing and questioning that an eyewitness would otherwise undergo. With surveillance films or other real-time video, whether taken by news cameras, undercover officers, or by automatic cameras, the assumption is that the film transparently shows the defendant committing the crime and that it grants the jurors access to the truth of the event to be tried as if they were the eyewitnesses themselves. In this sense, the courts over-endow the films with the status of the eyewitness; films are better than eyewitnesses because films are perceived as never mistaken. "Indeed this is the answer to a prosecutor's dream, to have such evidence as this."<sup>103</sup>

*b. Pipe Bombs*—The prosecution of Coleman Beeler for the malicious damage of vehicle by means of explosive material is a more detailed case in point.<sup>104</sup> The case describes how, in the early hours of July 26, 1997, Mr. Beeler allegedly detonated a pipe bomb in a 1995

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100. *Id.*

101. In support of the verdict, and without undermining the purported meaning and relevance of the film, the court does say that, "[E]ven if the tape was improperly admitted, the error was harmless . . . [T]he prosecution offered other substantial testimonial evidence to prove that [Guerrero was the egg thrower.]" *Id.* at 867. This is the more common refrain that, filmic evidence or no, the verdict would have remained the same. See *supra* notes 73–75 and accompanying text; *infra* notes 216–21 and accompanying text; see also e.g., *Montag v. Honda Motor Co.*, 75 F.3d 1414, 1420 (10th Cir. 1996); *United States v. Guerrero*, 667 F.2d 862, 867 (10th Cir. 1982).

102. 667 F.2d at 867.

103. *Id.* at 867.

104. *United States v. Beeler*, 62 F. Supp. 2d 136 (D. Me. 1999).

black Infiniti G20 parked on Indian Ridge Road in Yarmouth, Maine.<sup>105</sup> At approximately 2:30 p.m. on the day of the bombing, a man fitting the description of the defendant asked the clerk at the local Mobil Mini-Mart directions to Indian Ridge Road. When shown photos of the suspect, the Mini-Mart clerk could not identify him.<sup>106</sup> The convenience store's surveillance camera caught the customer on film, but it was a grainy, unclear image. When the government sought to enhance and edit the film to make it clearer, the defendant moved to suppress the edited tape. The defendant argued that the enhanced video was not trustworthy and would not be probative one way or the other of an issue for trial.<sup>107</sup>

In ruling that the enhanced and edited surveillance videotape could be admitted into evidence at trial as probative of the defendant's whereabouts on the day in question, the court relied on the tired analogy to enhanced audio tapes (tapes that are usually accompanied with a transcript to which the parties have stipulated).<sup>108</sup> Like other courts, the *Beeler* court ignored the differences between the communicative media of film, audiotape, and photography. The court unquestioningly applied the broad parameters of Fed. R. Evid. 1003 governing the admissibility of duplicates to determine whether the enhanced videotape "accurately reproduces the original images" on the video, thus satisfying the best evidence rule.<sup>109</sup> The court skipped the initial inquiry of whether the surveillance tape was admissible in the first instance as substantive evidence and jumped instead to the question of whether the edited version was admissible in the original's stead. After hearing the testimony of the government's video enhancement expert regarding the techniques of video enhancement, the court declared itself satisfied, having viewed the later versions of the tape, that the edited and enhanced versions of the Mobil Mini-Mart surveillance videotape were "*accurate, authentic and trustworthy* representations of the original tape. . . . The Court viewed all three versions of the Mobil Mini-Mart videotape . . . and is satisfied that they depict the same images and have not been manipulated to impermissibly alter the images. . . . The enhanced version is different only in that extraneous frames are no longer present and the images are larger, clearer, and easier to view."<sup>110</sup>

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105. *Id.* at 139.

106. *Id.*

107. *Id.* at 148.

108. *Id.*

109. *Id.*

110. *Id.* at 149 (emphasis added).

In applying the best evidence rule, the court determined that the enhanced videotape was just as accurate and genuine as the original tape, whatever that may mean. Consider that what is being described as “accurate” and “authentic” is three times removed from the event in the convenience store: it is a description of an enhanced version of a filmic representation of the conversation in the Mini-Mart. Granted, the court’s language—“accurate,” “trustworthy,” “authentic—derives from the language of and notes to Fed. R. Evid. 1003 (as well as from cases applying it),<sup>111</sup> but these words confuse the real issue before the court.

Hidden beneath the rather mechanical application of the best evidence rule, the court determined that the interpretation of the original video by the video-enhancement expert can properly be given the same (or better) status as an unfaltering eyewitness. The court’s analysis answers in the affirmative the question whether the film can be admitted as substantive evidence of the event itself absent a source or analysis of the camera’s point of view and absent any other corroborating evidence. The court thus consciously prefers as evidence a modified videotape, which apparently depicts with some ambiguity a filmic representation of a filmic representation of a man asking directions to the crime scene. Amazingly enough, testimony by the only witnesses to this conversation, the Mini-Mart clerk and the store customer, take second place in weight and credibility as compared to the enhanced and modified film.

Consider, too, the court’s conclusion that “[t]he enhanced version is different only in that extraneous frames are no longer present and the images are larger, clearer, and easier to view.”<sup>112</sup> The court is explicitly saying something that is intuitively very simple, that the edited version of the surveillance tape is not significantly different from the unedited version to make the edited version suspect. By so stating, however, the court is implicitly relying on controversial assumptions about the relationship of representation to the real and the role of both in the adjudicative process of law. Motivating the court’s careless application of the best evidence rule is the belief that the jury may take what they see in the edited tape as the definitive answer as to what happened that afternoon in the Mini-Mart. Despite the contested trial, the jurors need only view the film to render a guilty verdict. In other words, the court advises that the surveillance tape, although enhanced, “accurately reproduce[s] the scene . . . that took

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111. *See id.* at 150.

112. *Id.* at 139.

place," such that the tape may be admitted as substantive evidence of the identity of the Mini-Mart customer.<sup>113</sup>

The *Beeler* decision was rendered by a district court, ruling prior to trial on the admissibility of this filmic evidence. Unlike an appellate court, the *Beeler* court did not have the benefit of a full record and did not know what other evidence will be proffered at trial. Because of this, the district court's judgment about the film, and its import for the future trial, is all the more striking. Whereas the appellate courts, such as *Carpenter*, *Albert*, and *Guerrero*, were narrating retrospectively the events adjudicated at trial, in light of the filmic evidence and its likely interpretation, this district court narrates prospectively, predicting the film's place and import in the story that has yet to unfold. Both appellate and district courts convey a belief in law's proper role as serving a hierarchical regime of truth. They do so by using the film form, and particularly this *evidence verité*, as a trump card.

This same impulse is seen in other cases in which courts admit surveillance tapes of bank robberies during which hidden cameras have been triggered when certain vaults are opened.<sup>114</sup> In these cases, even when the court critiques the admission of the filmic evidence, they describe the film as if it were an unimpeachable eyewitness, tagging its representation with the status of real life, as if the film were a witness testifying to the only version of what happened, or as if the film were merely an extension of the jury's eye.<sup>115</sup> The history of film, discussed *infra* in Part II, teaches that neither characterization of film is correct. Films should be judged (as would a witness) by relying on close analysis of the apparent message conveyed. With a witness, through cross-examination, factfinders judge the witness's capacity and memory; with film, through a similarly structured inquiry, factfinders should interpret the film's message (a kind of judging) through close attention to its cues, codes, apparent referents, and its symbolic structure. Just as no witness is infallible, no film is singular in its meaning or significance. As will be shown *infra* Part III, to preserve the integrity of the trial, courts need neither endow film with an

113. *Id.* at 149.

114. See, e.g., *United States v. Taylor*, 530 F.2d 639 (5th Cir. 1976) (bank robbery); *State v. Young*, 303 A.2d 113 (Me. 1973) (bank robbery); see also *United States v. Bynum*, 567 F.2d 1167 (1st Cir. 1978) (automated stake out of robbery).

115. This has elsewhere been called the "silent witness" theory in which photographic and filmic evidence speaks for itself independent of any sponsoring witness. See Steven I. Bergel, Comment, "Silent Witness Theory" Adopted to Admit Photographs Without Percipient Witness Testimony, 19 SUFFOLK U. L. REV. 353 (1985); James McNeal, *Silent Witness Evidence In Relation to the Illustrative Evidence Foundation*, 37 OKLA. L. REV. 219 (1984); 3 WIGMORE, EVIDENCE § 790 at 220 n.4 (Chadbourn, rev. 1970) [hereinafter WIGMORE]. See also *State v. Pulphus*, 465 A.2d 153 (R.I. 1983) (discussing photograph speaking for itself).

objective status nor interpret its images for the jury in order to admit the film at trial.

### C. Staged and Scripted Filmic Evidence

Day-in-the-life films and videotaped expert reenactments are two genres of filmic evidence that differ from *evidence verité* in important ways but that are subject to the same inconsistent treatment in the case law.<sup>116</sup> First, they are often staged and scripted. One commentator has even called these kinds of films “works of art” inasmuch as they are rehearsed with outtakes, retakes, and special camera lenses.<sup>117</sup> Second, they are made with the trial in mind. “It is true, of course,” said one court, “that all evidence may be said in one sense to be self-serving . . . [but] not all evidence is a staged production whose finale is not only hoped for but very much a part of the script.”<sup>118</sup> Finally, surveillance footage, while filmed for the purpose of being offered as evidence, ostensibly depicts a subject unaware of the camera. The self-conscious performative nature of both day-in-the-life films and videotaped experiments becomes the center of the debate around their meaning, admissibility, and proper role in the trial process. When debating these kinds of films, courts frequently express skepticism, criticizing the film as too dramatic or as evincing too much “showmanship.”<sup>119</sup> As one early court said, echoing the sentiments of *Gibson v. Gunn*, “[T]he errors here involved . . . permitting the plaintiff to convert the court into a ‘movie’ picture theater . . . . Doubtless the show was highly entertaining to the jury, but entertainment of the jury is no function of a trial.”<sup>120</sup>

At the same time, however, these same kinds of films are frequently described, like other genres, of filmic evidence, as providing transparent access into the event at issue.<sup>121</sup> Admitted to illustrate direct or

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116. Day-in-the-life films are widely used evidentiary tools that aim to demonstrate the extent and impact of a plaintiff's injuries. See *infra* Part I(C)(2). Videotaped expert demonstrations may be computer simulations, filmed experiments performed under controlled conditions, or even videotaped learned treatises. See *infra* Part I(C)(1). See also Cerniglia, *supra* note 29, at 2–3.

117. Habert, *supra* note 29, at 309.

118. Balian v. Gen. Motors Corp., 296 A.2d 317, 324 (N.J. Super. Ct. 1972).

119. Jenkins v. Associated Trans. Inc., 330 F.2d 706, 711 (6th Cir. 1964).

120. Hadrian v. Milwaukee Elec. Ry. & Transp. Co., 1 N.W.2d 755, 758 (Wis. 1942).

121. See, e.g., Dodson v. Persell, 390 So. 2d 704 (Fla. 1980) (denying discovery of surveillance film of plaintiff because footage involves facts more readily available to plaintiff though “search for truth and justice can be accomplished only when all relevant facts are before the judicial tribunal”); Snead v. Am.-Exp. Isbrandtsen, 59 F.R.D. 148 (E.D. Pa. 1973) (stating that a “secret motion picture” can “reveal true nature of extent of injuries”); People v. Heading, 197 N.W.2d

circumstantial evidence or the testimony of some witness (a personal injury plaintiff or an expert), these kinds of films are described as effective in conveying a firsthand sense impression to the trier of fact of some relevant issue at trial.<sup>122</sup> One court explained the value of an expert reenactment as being “vivid and pertinent” and as showing “in a way that no words could capture” the disputed event at issue.<sup>123</sup> And, as with *evidence verité*, these films are typically classified for the purposes of admission as demonstrative evidence, “the thing itself” which lacks the classic problems of perception, memory, and mediation for which the rules of evidence are said to provide an antidote.<sup>124</sup> In other words, even though these staged and scripted films are admitted as demonstrative evidence, they are characterized as the very thing to be adjudicated at trial.

Thus, like *evidence verité*, day-in-the-life films and expert demonstrations are subject to inconsistent treatment. Although the puzzle presents itself in slightly different ways for day-in-the-life films than for expert demonstrations, the muddle, generally speaking, is this: courts explain that the very reason for the filmic proffer—its obvious relevance for the adjudicative task<sup>125</sup>—is what makes it prejudicial. Concerned that the jury will confuse the staged and scripted film with the actual event to be litigated, courts debate the prejudicial and probative effect of a film that is too “life like.”<sup>126</sup>

As compared to *evidence verité*, these cases appear to present a substantially different perspective on film; they recognize the power of the cinematic myth to create illusion using the indices of real life, and at the same time, worry that precisely this power is what renders the film inadmissible at trial. However, closer scrutiny of the case law reveals that not much has changed. When courts admit this staged and scripted filmic evidence, they have perceived a coincidence with the filmic interpretation of the event and the rest of the evidence at trial (as is largely the case with admitted *evidence verité*).<sup>127</sup> And, when courts

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325, 329 (Mich. App. Ct. 1972) (finding that “video tapes merely reproduce the accused’s physical participation in a lineup”); *Zimmerman v. Superior Court*, 402 P.2d 212, 216–17 (Ariz. 1965) (withholding film during discovery proceedings “on [the] premise that defendant’s [filmic] evidence . . . constitutes the unblemished truth, which, if prematurely disclosed, will prevent defendant from revealing to the jury the sham and perjury inherent in plaintiffs’ claims” (quoting *Boldt v. Sanders*, 111 N.W. 2d 225, 227 (1961))).

122. McCORMICK, *supra* note 15, § 212 at 3; Herlihy, *supra* note 45, at 140.

123. *Fusco v. Gen. Motors Corp.*, 11 F.3d 259, 263 (1st Cir. 1993).

124. Herlihy, *supra* note 45, at 140 (quoting 1 WIGMORE, EVIDENCE § 24 (C.P. Tillers rev. 1970)).

125. See, e.g., *Air Shields v. Spears*, 590 S.W.2d 574, 580 (Tex. 1979) (“The pictures are factual and bore directly on questions concerning [plaintiff’s] life as a blind person.”).

126. See, e.g., *Hinkle v. City of Clarksburg*, 81 F.3d 416, 425 (4th Cir. 1996).

127. See, e.g., *Air Shields*, 590 S.W.2d at 580.

exclude these kinds of filmic proffers, they have perceived a substantial risk that the jury will ignore the rest of the evidence at trial and be persuaded solely by the filmic rendition of events, which the courts have interpreted to be misleading in some particular way (as is also the case with excluded *evidence verité*).<sup>128</sup>

Whereas both rulings require the court to interpret the film, giving insight into how and what courts think the film means, only the latter exclusionary ruling gives insight into the court's perception of film's possible perverting influence on the trial, the second anxiety identified *supra*. When excluded, the film is perceived as uncontrollable, despite the court's controlled interpretation of the same; courts also appear concerned that the trial will suffer from a similar misperception. While the meaning of the film may be unruly, these courts submit that the meaning made at trial may not be.<sup>129</sup> Here, courts express their role as arbiter of the trial process, not only as evidentiary gatekeeper, but also as a kind of narrator.

1. *Car Accidents and The Substantial Similarity Test*—The 1993 case of *Fusco v. General Motors Corporation* concerns the admissibility of two expert reenactments of a car accident.<sup>130</sup> Carol Fusco brought the products liability case against the automobile manufacturer, alleging that while driving her Chevrolet Chevette near Pelham, New Hampshire, in 1986, her “car suddenly left the roadway, slid across an ice-covered embankment and hit a telephone pole.”<sup>131</sup> She sued, claiming that the steering system in the car was defective, in that the front left “ball stud” had separated from the tie rod due to metal fatigue causing the accident.<sup>132</sup> General Motors (GM) defended by arguing that the ball stud was broken upon impact and was therefore not the cause of the accident.<sup>133</sup> The trial ended in a verdict in Fusco's favor and the jury awarded her one million dollars in damages.<sup>134</sup> The trial was a classic battle of the experts, and GM appealed, in part, based on the

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128. See, e.g., *French v. Springfield*, 357 N.E.2d 438 (Ill. 1976).

129. As Jennifer Mnookin has written about the history of the use of the photograph at trial, at first, the courts' fear was that photographic evidence would render the trial and its intricate sifting and weighing process redundant, perhaps even obsolete. Mnookin, *supra* note 16, at 56. This Article addresses a related concern, not that the trial is rendered obsolete, but that it will be perceived as commandeered by the force of the filmic evidence, whatever the accuracy of its representation.

130. *Fusco v. Gen. Motors Corp.*, 11 F.3d 259 (1st Cir. 1993).

131. *Id.* at 260–61.

132. *Id.* at 261.

133. *Id.*

134. *Id.*

district court's exclusion of GM's expert's "driving tapes"—videotapes of various accident scenarios described by GM's experts.<sup>135</sup>

The first tape displayed a car mounted on a lift to reveal the proper connection of the ball stud and tie rod. It showed how, in the subsequent experiment, the stud would be altered to disengage and simulate the plaintiff's version of the accident. The second tape was filmed at GM's test track, and showed a test drive of the car whose ball stud was disconnected from the tie rod and the resulting path of the car accident. This second film "showed that, when the left wheel separated from the tie rod, the wheel flopped out of alignment with the right wheel and dragged on the highway . . . creating a long black skid mark. The car did not veer out of control or hit the track barrier" as Ms. Fusco had experienced.<sup>136</sup>

Filed expert demonstrations are typically reenactments of an accident or injury under certain controlled conditions to demonstrate or discern its cause.<sup>137</sup> As a kind of demonstrative aid, they are subject to a variant of the familiar admissibility standard for demonstrative evidence.<sup>138</sup> The threshold requirement of competency, relevancy, and prejudice is subsumed under a "substantial similarity test":

Admissibility of [experiments or tests] depends upon a foundational showing of substantial similarity between the tests

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135. *Id.*

136. *Id.* at 262.

137. Videotaped expert demonstrations differ from learned treatises, although the case law treats them similarly. Expert demonstrations are reenactments of the event at issue to prove or disprove some material fact, whereas treatises are manuals and films made by professional organizations or individuals in order to instruct, generally, without litigation in mind. For cases discussing the videotaped learned treatise as a possible "contemporary variant" of written treatises and therefore subject to the hearsay exception under Fed. R. Evid. 803(18), see *Constantino v. Herzog*, 203 F.3d 164 (2d Cir. 2000), and *Loven v. State*, 831 S.W.2d 387 (Tex. App. 1992). *Contra* *Simmons v. Yurchak*, 551 N.E.2d 539 (Mass. App. Ct. 1990).

138. As described *supra* at Part I(A), demonstrative aids such as maps, illustrations, or models, are, generally speaking, not admitted as evidence as they fail to make the existence or nonexistence of a material fact more or less likely. *Brain & Broderick*, *supra* note 32, at 1018; *see also* *Cerniglia*, *supra* note 29, at 8 (pedagogical devices are not offered into evidence; demonstrative aids do not have sufficient evidentiary status to support a finding of prejudice). However, as has been clear throughout this Article and the discussion of the case law *supra*, the "demonstrative" category does little useful work; many traditional forms of demonstrative evidence, such as photographs and films, are routinely shown to the jury (and impliedly if not explicitly admitted into evidence) on the basis that they are competent, relevant (often discussed in terms of "helpful" and "factual"), and not unduly prejudicial. *Fusco*, 11 F.3d at 263 (finding expert tape is "helpful" to the jury); *United States v. Nixon*, 777 F.2d 958, 973 (5th Cir. 1985) (stating "probative value of [surveillance] tape is beyond question"); *Air Shields*, 590 S.W.2d at 580 (finding day-in-the-life film is "factual"); *Pisel v. Stamford Hosp.*, 430 A.2d 1, 8 (Conn. 1980) ("[T]he question before the court is whether its value as evidence outweighs its possible prejudicial effect.").



conducted and actual conditions. Perfect identity between experimental and actual conditions is neither attainable nor required. Dissimilarities effect [sic] the weight of the evidence, not admissibility. Finally, the decision whether to admit or exclude evidence of experiments in a particular case rests largely in the discretion of the trial judge. . . .<sup>139</sup>

Expert videotaped demonstrations are therefore admissible after some witness has already testified that, for example, the film accurately reproduces the relevant facts already in evidence. With regard to experiments that purport to show how an accident should have happened, were the facts as the plaintiff described them, the rule is that, for the filmed results of the test to be admissible, the test conditions must be “substantially similar” to those pertaining to the litigated event.

The *Fusco* court recites this test and praised this kind of evidence as helpful. It wrote:

[T]he test track replication shown on the driving tapes . . . is vivid and pertinent: one sees, in a way that no words could capture, the tire wheel flip out of alignment and the tire then dragging on the track. The impression left is that such an accident would leave a tire streak, as claimed by General Motors, and that the car is more likely to flop and drag than to veer sharply off the road [as the Plaintiff has testified]. A lay juror, asked whether a look at the tapes would be helpful, would likely answer yes.<sup>140</sup>

The court is describing the very reason for a proffer of filmic evidence and for its confused status in the case law: “[S]ince ‘seeing is believing,’” writes one evidence scholar, “and demonstrative evidence appeals directly to the senses . . . , it is today universally felt that this kind of evidence possesses an immediacy and reality which endow it with particularly persuasive effect.”<sup>141</sup>

And here is the muddle. The persuasiveness of this so-called demonstrative evidence becomes the root of its admissibility troubles. The *Fusco* court concludes that the film’s uniquely persuasive effect is the source of its prejudicial impact and thus its excludability. Despite noting that the concept of “substantial similarity” is a flexible one,<sup>142</sup>

139. *Ramseyer v. Gen. Motors Corp.*, 417 F.2d 859, 864 (8th Cir. 1969).

140. *Fusco*, 11 F.3d at 263.

141. *McCORMICK*, *supra* note 15, § 212 at 3.

142. *Fusco*, 11 F.3d at 264.

the court finds that, with GM's driving tapes, the conditions were not similar enough to be relevant. It explained: "[t]he test occurred in controlled conditions, on a test track with a driver expecting the occurrence, and with a doctored piece of equipment rather than one that actually broke."<sup>143</sup> Here, the court reasons its way into a corner. It seems this court would only be satisfied with a film of the accident itself, which is impossible. Under such a standard, no such demonstrative aids would ever be shown to a jury.

In response to GM's argument that some films are admissible not under the "substantial similarity test" as experimental reenactments *per se*, but merely as relevant and accurate illustrations of general, scientific principles—the behavior of a car with a disconnected ball stud, for example—the court still held the tapes inadmissible. The court invoked a related test, but rejected its application as well. "When this [scientific principles] label is attached, courts often do not ask about *similarity* of conditions but only whether the test was *properly conducted*. We think it would be a great stretch to call the tapes an abstract demonstration of scientific principles, but the critical point is not one of labels."<sup>144</sup> The court rejected the evidence even under this second looser test because it believed the films were "sufficiently close in appearance to the original accident to create the risk of misunderstanding by the jury."<sup>145</sup> Even with limiting instructions to the jury, the court held that "the drama of the filmed recreation could easily overcome the logic of distinctions."<sup>146</sup>

The legal conundrum is easily summed up: substantial similarity is necessary to admit filmed experiments, but substantial similarity is a nearly impossible burden to meet because accident recreation is always under controlled circumstances, which were necessarily absent from the past event being litigated. Where films of general scientific principles are admissible, without a test for substantial similarity, these films of general principles nevertheless look *too* much like the accident in question (which, of course, would be the point of the film). They therefore risk confusing the jury as to the difference between the filmed event and the actual one. As McCormick has said, the danger is that "the jury may confuse art with reality."<sup>147</sup> In essence, the court holds that the staged drama of the film is too life-like to be interpreted by the

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143. *Id.*

144. *Id.* (brackets in the original) (emphasis added) (quotations and citations omitted).

145. *Id.*

146. *Id.*

147. MCCORMICK, *supra* note 15, § 214 at 19.

jury as mere hypothesis and experiment. The film's "demonstrative" quality renders the evidence too prejudicial.<sup>148</sup>

Taken apart, these separate arguments seem reasonable. Substantial similarity assures accuracy and relevance; other, less particularized experiments, while generally relevant, risk being more prejudicial than probative. Taken together, however, and especially in light of the trial process—itsself a staged performance tailored for accuracy and relevance—the *Fusco* court's reasoning is shallow and even self-contradicting. The contradiction suggests an anxiety over what film does and how it constructs meaning in relation to the trial's function. If the court is doing its job providing limiting instructions and the jury is following them (which the courts most often assume is the case),<sup>149</sup> why worry about how the jury could be interpreting the film absent those instructions? Is there any real concern that the jury will confuse the reenactment in the film with the accident disputed? If the court is right, and the film is so clearly distinct from the accident at issue—remember it has been labeled a reenactment and it is a film of a test track, not the highway in Pelham, New Hampshire—why worry? It seems, really, the court fears it does not understand how the film affects the jury and its decisionmaking process, aside from (or perhaps because of) the film's "vivid" replication of the accident "in a way that no words could capture."<sup>150</sup> The court's anxiety is based on an unsubstantiated notion that the interpretation and meaning of film, unlike testimony, documents, or drawings, is out of its control. But the meaning constructed through film is no more or less out of control than the meaning made through other traditional forms of communication used at trial, such as testimony and written language.<sup>151</sup> Before describing how such is the case, however, the discussion below considers the last genre of filmic evidence: Day-in-the-life Films.

2. *Day-in-the-life Films: Feature Film or Factual Exhibit?*—Like filmed expert demonstrations, day-in-the-life films are staged and scripted for

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148. See, e.g., *Hinkle v. City of Clarksburg*, 81 F.3d 416, 425 (4th Cir. 1996) (noting "potential prejudicial effect of [filmic] evidence because the jury viewing a recreation might be so persuaded by its life-like nature that it becomes unable to visualize an opposing viewpoint of those events"); *Gladhill v. Gen. Motors Corp.*, 743 F.2d 1049, 1052 (4th Cir. 1984) (same). While this makes sense given the enduring quality of images as opposed to language on memory, it seems more of a practitioner problem than an evidence problem. The film should still be admissible as relevant and probative, and only prejudicial if for some reason the opposing counsel is prohibited from undermining the film's dominant representation through discovery or cross-examination. And, obviously, if there are other experimental scenarios, the opposing counsel should find them and use them.

149. *Penry v. Johnson*, 532 U.S. 782, 800 (2001) ("We generally presume that jurors follow their instructions."); *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (same).

150. *Fusco*, 11 F.3d at 263.

151. See *infra* Part II.

the courtroom. They are most often plaintiff-prepared films used to prove damages in personal injury cases. The paradigmatic day-in-the-life film is produced by filming an entire day's activities at the plaintiff's home and subsequently editing this material down to a manageable length for trial use. A variation on this theme is to film the plaintiff's physical therapy session as evidence of damages in a personal injury action. Day-in-the-life films not only record recurring events in the plaintiff's life, but also bring into clear focus the plaintiff's ongoing need for special medical attention. "Films of this sort are often silent, but voiced-over narration by a medical expert or close family member is becoming common."<sup>152</sup>

Although now quite routine in personal injury lawsuits, these kinds of filmic proffers were originally perceived with skepticism and were excluded from trials as a form of entertainment rather than evidence.<sup>153</sup> The contemporary debate in the case law concerning the use of day-in-the-life films remains rooted in this original skepticism: how does one tell fact from fiction in these films, and how do courts prevent (what appears as) self-serving evidence of pain and suffering from diverting the factfinder's judgment.<sup>154</sup> For example, one court determined when evaluating a day-in-the-life film that, because the film "represents a staged reproduction of one party's version of the facts, it should be examined with care because of the danger that the filmmaker's art may blur reality in the minds of the jury."<sup>155</sup> Phrased this way, this concern echoes those that gave rise to the "substantial similarity test" with regard to filmic expert reenactments. Indeed, many of these personal injury cases bring the contradictions and anxieties discussed above into even sharper focus.

Like the case law concerning expert video demonstrations, courts considering day-in-the-life films waffle indecisively between describing the film as, on the one hand, a self-conscious performance too dramatic and evocative to be properly admitted or effectively contained at trial, and as, on the other hand, a transparent view of the subject to be adjudicated and the best evidence of the plaintiff's injuries. Some courts say that day-in-the-life "films illustrate, better than words, the

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152. Herlihy, *supra* note 45, at 133–34.

153. See, e.g., *Gibson*, 202 N.Y.S. at 20.

154. See, e.g., *Thomas v. C.G. Tate Constr. Co.*, 465 F. Supp. 566 (D.S.C. 1979) (excluding day-in-the-life film as prejudicial given its piecemeal and yet powerful presentation); *Bolstridge v. Cent. Maine Power Co.*, 621 F. Supp. 1202 (D. Me. 1985) (excluding day-in-life film because it would dominate conventional evidence and was otherwise self-serving); *Haley v. Byers Transp. Co.*, 414 S.W.2d 777 (Mo. 1967) (excluding day-in-life film on grounds of prejudice and incompetence).

155. *Pisel v. Stamford Hosp.*, 430 A.2d 1, 8 (Conn. 1980) (citing *McCORMICK, EVIDENCE* 2D § 14).

impact the injury had on the plaintiff's life in terms of pain and suffering and loss of enjoyment of life. While the scenes are unpleasant, so is the plaintiff's injury."<sup>156</sup> These courts explain that "[t]he purpose of the movie is to give the jury a grasp of the full extent of plaintiff's disabilities and handicaps."<sup>157</sup> Although talking about a different genre of film, these sentiments echo the *Fusco* court's remark that film depicts in a way "no words could capture."<sup>158</sup>

The case of Robert Allen Thomas against C.G. Tate Construction Company is typical of the case law analyzing day-in-the-life films.<sup>159</sup> Mr. Thomas was burned very badly in an automobile accident. A month after his accident, while enduring the painful and intense physical therapy required to rehabilitate burn victims, Thomas' attorneys arranged to film one of his physical therapy sessions. After receiving and viewing the film during discovery, defendant filed a motion in limine to exclude the film from evidence at trial.<sup>160</sup>

In ruling on defendant's motion in limine, this district court provided an unusually detailed and evocative description of filmic evidence. Quoted below is the court's description and experience of the film:

The tape begins with a panoramic view of the physical therapy room and then shows plaintiff entering the room wearing bathing trunks, with both arms held in an outright position. The left hand and arm were bandaged from hand to elbow, the right from hand almost to elbow. The physical therapist begins removing the bandages by cutting them from the plaintiff's arms with a pair of scissors. After removing the bandages, the therapist appears to wipe, with gauze or a similar substance, what appears to be white grease or ointment, after which she appeared to be wiping away dead or burned skin. During the entire removal procedure, visual expressions and contortions of pain are depicted, plaintiff emits a plethora of continual groans or moans. Plaintiff then steps into a large tub filled with what appears to be a soapy solution with arms still in an outstretched, horizontal

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156. *Grimes v. Employers Mut. Liab. Ins. Co.*, 73 F.R.D. 607, 610 (D. Ala. 1977); *see also Caprara v. Chrysler Corp.*, 423 N.Y.S.2d 694, 699 (App. Div. 1979).

157. *Cisarik v. Palos Cmty. Hosp.*, 579 N.E.2d 873, 874 (Ill. 1991).

158. *Fusco*, 11 F.3d at 263.

159. *Thomas v. C.G. Tate Constr. Co.*, 465 F. Supp. 566 (D.S.C. 1979).

160. In the alternative, defendant asked that the film be edited "so as to delete therefrom all audio portions and all video portions that demonstrate outward manifestations of pain experienced by the plaintiff." *Id.* at 567. Defendant also sought to exclude nineteen color photographs of the plaintiff during the early stages of his recovery. Although his motion was granted with regard to the film, the color photographs were allowed into evidence. *Id.*

position, then sits down in the tub and immerses his arms. This action is accompanied by facial grimaces. . . . [T]he physical therapist is shown as washing or rubbing the burned areas on the plaintiff's arms and back. . . . Plaintiff is required by the physical therapist to lift his left arm which shows extensive burns and as she cleans this arm, plaintiff is shown to be experiencing extreme pain. Throughout, plaintiff continues to emit groans which amount almost to screams and it appears as if he may faint. At approximately this point in the session, plaintiff's wife appears in the film and attempts to soothe the plaintiff by putting her arms around him, patting him on the face and head, and in the area of his right breast. . . . After the plaintiff has spent several minutes in the tub, . . . the whirlpool device is deactivated. It appears that the plaintiff delays getting out of the tub until he can regain his composure. . . . Plaintiff appears exhausted. He is breathing extremely heavily and his head is held down, his eyes closed and his arms extended. His wife continues to soothe him.<sup>161</sup>

Despite the court's explicit and attentive description of the film, the judge explains that his words are insufficient—and that words generally are inadequate—to fully capture the film's portrayal of Mr. Thomas' pain and suffering.

It is impossible in the foregoing brief summary to completely depict what is *revealed* by the audio and visual presentation of this tape. The tape *positively shows* that plaintiff is experiencing extreme pain and mental anguish. During the viewing of this tape, one has a tendency to try to disregard it and to direct his attention to something more pleasant, and if one has the slightest tendency to be squeamish, a feeling of nausea arises.<sup>162</sup>

Not only did the court think words are insufficient to accurately and comprehensively convey the extent of Thomas' injury, but the court appeared to believe that the film accomplishes that feat in the clearest way possible. The court's use of words such as "revealed" and "positively shows" exposes its presumptions about film's capacity to signify better and more exhaustively than other communicative media (such as written or verbal language). The court's uncommonly close reading of the film nevertheless appeared to eschew the notion that

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161. *Thomas*, 465 F. Supp. at 568.

162. *Id.* at 568–69 (emphasis added).

film is as mediated and self-consciously constructed as the plaintiff's testimony would be.

This understanding of the film provided the basis for the *Thomas* court to analyze it as a species of demonstrative evidence, which the court states is admissible to explicate testimony once it is properly authenticated and relevant.<sup>163</sup> The court then switched the evidentiary category from demonstrative to substantive (as seen throughout the case law) to explain that the tape is independently relevant under Fed. R. Evid. 401, therefore requiring a Rule 403 analysis for prejudice.<sup>164</sup> Quoting Professor Weinstein, the court said, "[R]elevancy is not always enough. There may remain the question, is its value worth what it costs? Will the search for truth be helped or hindered by the interjection of distracting, confusing or emotionally charged evidence?"<sup>165</sup> The court concluded that, despite the film's relevance and the clarity of its depiction of the plaintiff's injury, the film should be excluded on two related prejudice grounds.

First, the court felt that the film would unduly dominate the evidence at trial. "During the course of the trial, the presentation of the tape may consume an appreciably greater proportion of the anticipated trial time. The novelty of using a video tape in the courtroom in and of itself may make the tape stand out in the minds of the jury. Unquestionably, it will dominate the evidentiary scene."<sup>166</sup> As to this first point, it seems clear that the court itself had been emotionally touched by the film ("a feeling of nausea arises"<sup>167</sup>) and is imparting onto the jury its own reaction to the film. The court's comment that "the real decision in this case turns on the fact that this is a jury case. If it were before the court, for a bench trial, a different result might be obtained" confirms this displacement.<sup>168</sup> The court's own descriptive and emotional language notwithstanding, it appears that the court thinks itself sufficiently immune from the dominating and powerful effects of the film's images that will otherwise contaminate the jury's deliberations to render a fair and impartial decision excluding the evidence.

Second, the court also perceived the film as selective in its portrayal of the plaintiff's pain. Even in view of the film's relevance, the court said, "[i]t can conceive of no way in which the defendant can possibly depict with equal impact those periods of time during the plaintiff's

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163. *Id.* at 569.

164. *Id.*

165. *Id.* at 570.

166. *Id.* at 571.

167. *Id.* at 569.

168. *Id.* at 570.

recovery process when he was . . . relatively speaking, free of pain. . . . [N]o amount of testimony from the attending physician, nurses, . . . could possibly offset the dramatic effect of the audio-video tape in question."<sup>169</sup> Without undermining the authenticity of the plaintiff's expression of pain as depicted in the film, the court concluded, essentially, that the film fails to tell the whole story, or at least a more balanced story.

As to this second point, an obvious question follows: why should the film be required to tell a balanced story when it is just one piece of evidence in support of the plaintiff's case? The answer lies in the court's self-created evidentiary dilemma: having deemed the film demonstrative rather than expressive, the film can only illustrate testimony rather than speak for itself, it has and should have no independent or limiting point of view. Yet, having experienced the film in a physical and emotional manner (as it imagines a jury might) with its unique rhetorical effect, the court deems the film singularly probative of the plaintiff's pain and suffering. As demonstrative evidence, the film is not qualified to convey independent significance; and yet, as with the courts who evaluate *evidence verité* and like the *Fusco* court, this court recognizes that the film does more than just visually illustrate a witness's testimony. It asserts its own meaning—an argument, so to speak—about the quality of the plaintiff's life post-injury, his relationship with his wife, and his struggle to heal. Instead of sorting through this obstacle course of evidentiary issues, the court simply excludes the evidence.

## PART II. FILM THEORY

### A. *Basic Principles: The Myth of Total Cinema*

In the preceding Part I, it was shown how courts in their rulings admitting or excluding filmic evidence frequently evaluate film as a demonstrative aid only to later marshal the film toward substantive ends. This presumes that film not only illustrates testimony, but that it transparently reveals the reality it purports to capture. Part of the confusion stems from the court's confidence in the transparency of filmic representation, which transparency is implicated by a century of film

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169. *Id.* at 571; *see also id.* at 570 ("The tape in question depicts less than one-half hour of the plaintiff's recuperation period which required several months."). This is not unlike the concern expressed in *Hinkle v. City of Clarksburg*, 81 F.3d 416, 425 (4th Cir. 1996) and *Gladhill v. General Motors Corp.*, 743 F.2d 1049, 1052 (4th Cir. 1984).



theory and history teaching the opposite. This Part provides a brief survey of central lessons from that film theory and history in order to provide a foundation for questions that courts and advocates might want to begin asking about filmic proffers. In Part III, those questions are asked of the cases discussed above.

1. *Montage and Camera Technique*—Since before film was ever proffered as evidence at trial, film makers and theorists have been writing about film's peculiar mode of representation and its proliferation through the phenomena of spectatorship.<sup>170</sup> In fact, preoccupations with what it means to know and to see, to witness and to judge, and to be part of a political community through spectatorship were embedded in and shaped the theories of film and filmmaking from its early stages.<sup>171</sup>

Historically speaking, film was an aesthetic and epistemological marvel because of its unique relationship to the real. For Andre Bazin, "The mechanical means of photographic reproduction . . . assured [an] . . . 'objectivity' of film."<sup>172</sup> Following many filmmakers and theorists of the early to mid-20th century, Bazin was concerned with just how this objectivity would translate into popular narratives that would circulate in culture. He studied film for its mythic capacity and its total worldmaking, beginning with what has become the basic premise of film's unique language: the ontological bond between the filmic representation and the thing or event filmed. This indexical linkage, gave rise to later theories suggesting that film "bears unimpeachable witness to 'things as they are.'"<sup>173</sup>

The objective nature of photography confers on it a quality of credibility absent from all other picture-making. In spite of any objections our critical spirit may offer, we are forced to accept as real the existence of the object reproduced, actually *re*-presented, set before us, that is to say, in time and space. Photography enjoys a certain advantage in virtue of this transference of reality

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170. See generally MIRIAM HANSEN, *BABEL AND BABYLON: SPECTATORSHIP IN AMERICAN FILM* (1991) (tying the emergence of spectatorship and silent era cinema to the historical transformation of the American public sphere); VIVIAN SOBCHACK, *THE ADDRESS OF THE EYE: A PHENOMENOLOGY OF FILM EXPERIENCE* (1992) (arguing that the film experience is based on an exchange of gazes, the spectator, and the film, each existing as both subject and object of vision).

171. See HANSEN, *supra* note 170. See also Tom Gunning, *Embarrassing Evidence: The Detective Camera and Documentary Impulse*, in *COLLECTING VISIBLE EVIDENCE* 46, 46 (Jane M. Gaines & Michael Renov eds., 1999) (describing early cinema as constituting the audience "as both voyeur witness and moral judge").

172. ROBERT STAM ET AL., *NEW VOCABULARIES IN FILM SEMIOTICS: STRUCTURALISM, POST-STRUCTURALISM AND BEYOND* 185–86 (1992).

173. *Id.* at 186.

from the thing to its reproduction. A very faithful drawing may actually tell us more about the model but despite the promptings of our critical intelligence it will never have the irrational power of the photograph to bear away our faith.<sup>174</sup>

Although writing here about photography, Bazin's comment is a prelude to his analysis of film, which takes photography one step closer to what Bazin considers the "myth of total cinema."<sup>175</sup>

The guiding myth, then, inspiring the invention of cinema, is the accomplishment of that which dominated in a more or less vague fashion all the techniques of the mechanical reproduction of reality in the nineteenth century, from photography to the phonograph, namely an integral realism, a recreation of the world in its own image, an image unburdened by the freedom of interpretation of the artist or the irreversibility of time.<sup>176</sup>

Bazin's point was that film made spectators feel as though they were witnessing the event or object in the state of being filmed, rather than seeing it in its represented filmic form. Bazin argued that film's uniquely ontological relationship between the thing or event filmed—its shape, color, duration, movement—and the thing or event itself separates film from other ways of representing the world.<sup>177</sup> The myth of film was that film somehow reproduced the world unmediated when, in fact, its reproduction was no more or less expressive or informative than other mimetic forms.<sup>178</sup>

This special quality of film has been recognized since the inception of film making and viewing. Consider the story regarding the first film played to a movie theater audience, *L'arrivee d'un train en gare* (The Arrival of a Train in the Station). Upon showing this particular film at the Grand Café in Paris in 1895<sup>179</sup>—of a train arriving into the station and the camera stationed on the quay such that the train grew larger and larger on screen as it got closer to the station—the audience screamed and ran from the theater, afraid the train would run them down. Unaccustomed to the illusion of reality in motion that film creates, the 1895 audience feared for their lives and never saw the end of the film. Knowing this, the Lumière brothers, the filmmakers of

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174. ANDRE BAZIN, *WHAT IS CINEMA?* 13–14 (Hugh Gray trans., 1967).

175. *Id.* at 17.

176. *Id.* at 21.

177. *Id.*

178. *Id.*

179. GERALD MAST & BRUCE F. KAWIN, *THE MOVIES: A SHORT HISTORY* 22 (1996).

*L'arrivee d'un train en gare*,<sup>180</sup> played with the expectations of their audience, expectations that remain part of the movie-going experience today: film's mimetic quality of lived experience provides the audience with the pleasure of playing the role of witness to some event projected on screen, whether or not the event has ever occurred beyond the screen itself.<sup>181</sup>

The film is not a mechanism for witnessing, however, and it is not the thing itself; the perception of film's capacity to wholly and truthfully reveal the world is a myth, "an idealistic phenomenon . . . as if in some platonic heaven."<sup>182</sup> In fact, as we know from our experience of film, film no more reveals the world than it reconstructs it. Film, like any representational form, must be interpreted, and its specific language and its way of constructing meaning must be accounted for. One way of constructing meaning is through montage: "the creation of a sense or meaning not proper to the images themselves but derived exclusively from their juxtaposition."<sup>183</sup> The famous "Kuleshov experiments" performed on students at the Moscow Film School in the 1920s exemplifies the montage principle, *e.g.*, how the meaning of a single shot changes dramatically depending on the image that precedes it.

Kuleshov cut the shot of Mozhukin's face into three pieces. He juxtaposed one of the strips with a shot of a plate of hot soup; he juxtaposed the second with a shot of a "child (in some accounts, an old woman)" in a coffin; he juxtaposed the third with a shot of a little girl playing with a toy bear. When viewers . . . saw the finished sequence, they praised Mozhukin's acting: his hunger when confronted with a bowl of soup, his sorrow for "his dead child" (their interpretation), his joy when watching "his daughter" playing. Mozhukin's neutral expression was identical in all three pieces of film. The juxtaposed material . . . evoked the concept or emotion in the audience, which then projected it into the actor. Editing alone had created the scenes, their emotional content and meaning.<sup>184</sup>

Other than montage, another way of constructing meaning through film is through a careful manipulation of the camera's per-

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180. *Id.*

181. Laura Mulvey, *Visual Pleasure and Narrative Cinema*, in *VISUAL AND OTHER PLEASURES* 14, 14-26 (1989).

182. BAZIN, *supra* note 174, at 17.

183. *Id.* at 25.

184. MAST, *supra* note 179, at 176.

spective (angles) and breadth of view (wide shots and focus). D.W. Griffith, the initial master of this kind of film language, was the engineer of the close-up, deep focus, and the long shot, pan shot, and traveling shot, and he was the first filmmaker to make use of lights in the studio and an ensemble cast. His films, such as *The Birth of A Nation* and *Intolerance*, are taught not only for their social history of America, but their development of film rhetoric and grammar.

Griffith had learned . . . [that f]ilms were capable of mirroring not only physical activities but mental processes. Films could recreate the activities of the mind: the focusing of attention on one object or another (by means of a close up), the recalling of memories or projecting of imaginings (by means of a flashback or forward), the division of interest (by means of the cross-cut). Griffith had come to realize . . . the importance of the interplay between events presented on the screen and the spectator's mental synthesis of those events. Griffith's "discovery" was far more than a mere technique . . . it was the way to make film narrative, storytelling with moving images, *consistently coherent*.<sup>185</sup>

2. *Point of View and the First Person Narrative*—The theorization of film form and its strategies for constructing meaning fairly began with these two techniques in the Soviet Union and the United States. Soon thereafter, the first person narrative film—the notion that the film can embody a point of view, a single subject with thought, direction and desire—also took root. Griffith and the German Expressionists initiated the first person narrative in the late 1910s and early 1920s, making films shot from the point of view of a single narrator with which the film audience would identify. The development of the first person narrative capitalized on film's capacity for intimacy and revelation by blurring the "boundary between subjective and objective perceptions."<sup>186</sup> In one sense, the first person narrative helped perpetuate the sense of singularity and wholeness in the viewing audience, the sense that they were seeing with their own eyes the events on screen as if live before them; in another sense, however, knowing and seeing, from that singular perspective, was problematized as based on the trustworthiness of the individual doing the storytelling and to whose view the audience is privy. Here, not twenty years after the birth of film, the development of the first person

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185. *Id.* at 58–59.

186. *Id.* at 151.

narrative art was already problematizing film's purported omniscient qualities and its false sense of transparency.

Nevertheless, the first person narrative film style drove the film industry. Indeed, it drove the cinematic art of worldmaking from Europe to the United States. Although in the way just mentioned, it could be seen as problematizing the first person's view point, this narrative form flourished, in part, because it was also experienced as glorifying and legitimizing the individual person as the source of meaning. Based in large part on the illusion of visual coherence of the thing on film and the thing filmed, the mainstream film experience of the first person narrative perpetuated the fantasy of the authentic, centered subject from where the meaning of the film originates.<sup>187</sup> Film theorists in the 1950s and 1960s would write that film, like language, is an instrument of ideology constituting the subject through its formal mechanisms of seeing and the appearance of being seen, the illusory delimitation of a central location, a perspective focused on the subject as center of the story, what Bazin called a "bourgeois idealism."<sup>188</sup> Narrative theories of the Classical Hollywood style, "which present psychologically defined individuals as its principal causal agents,"<sup>189</sup> furthered the notion of cinema as encouraging the film's audience to construct the events of and in film as coherent and consistent and as hinging on their personal role and influence.

3. *Self-Reflexive Filmmaking: Being Aware of the Camera*—Early filmmakers' preoccupations with what it means to know and see through film (to witness and to judge through film form) manifested in more than the development of the first person narrative, but also in terms of filmic themes of self-referentiality and reflexivity. Reflexivity in film—drawing attention to film's constructed nature by either making manifest its formal qualities or breaking with its illusion to draw the audience into the meaning making of the film's story—was born with the earliest of films.

George Melies' *The Magic Lantern*, made in 1903, is one such film. It is often cited as the first film *of a film*, telling the history of Western dramatic art, showing first a landscape painting, then a play, and then an image of the newly developed moving pictures. By placing film in the trajectory of Western representational art, Melies' film shows that film art is no more or less faithful to its subject than painting. It also

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187. STAM, *supra* note 172, at 186–87; Jean-Louis Baudry, *Ideological Effects of the Basic Cinematographic Apparatus*, in *FILM THEORY AND CRITICISM* 302–312 (Gerald Mast et al. eds., 1992); Jean-Luc Comolli & Jean Narboni, *Cinema/Ideology/Criticism*, in *MOVIES AND METHODS* 22 (Bill Nichols ed., 1976).

188. STAM, *supra* note 172, at 186–87 (quoting Baudry).

189. *Id.* at 189.

piques spectators' attention, drawing spectators out of the passive experience of the spectacle and out of the illusion of voyeurism into a more active role of contributing to the meaning constructed through film. To recognize that the film's story is just one representational scheme among others is to acknowledge their complicity in the perpetuation of the illusion of film's omniscience and their participation in the film's popular and personal meaning. It became a common practice in early films to tell stories about telling stories through pictures. Although now a ubiquitous and varied featured of cinema—think of films like *Adaptation*<sup>190</sup> or Hitchcock's classic *Rear Window*<sup>191</sup>—film's early self-reflexive tendencies were considered another way of commenting on its illusionism and of providing another mode of resistance to what Bazin later dubbed the "myth of total cinema."<sup>192</sup>

The alliance of film form (especially its self-reflexivity) with legal stories was also apparent from the beginning of film. In 1907, only a dozen years after the first film was shown in Paris, D.W. Griffith made one of his first appearances on film, in the biograph picture *Falsely Accused!*<sup>193</sup> (Biographs were an evolved form of Edison's Kinetoscope.)<sup>194</sup> *Falsely Accused!* opens with a murder of an inventor and the accusation that his daughter committed the crime. The daughter's boyfriend, dwelling on the crime scene, finds a motion picture camera, which miraculously had been running during the commission of the murder. He develops the film—whose images reveal the true murderer—and rushes it to the courthouse where he shows it to the judge and jury just in time to free his girl. It has been argued that *Falsely Accused!* is one genesis for those "trial films"<sup>195</sup> in which the exculpatory piece of evidence is magically caught on film (by a still or moving camera), which once developed is shown in court in a triumphant

190. *Adaptation* (Columbia Pictures 2002).

191. *Rear Window* (Paramount Pictures 1954); Robert Stam & Roberta Pearson, *Hitchcock's Rear Window: Reflexivity and the Critique of Voyeurism*, in ENCLITIC 7 (1): 136–45 (Spring 1983); see also ROBERT STAM, REFLEXIVITY IN FILM AND LITERATURE: FROM DON QUIXOTE TO JEAN-LUC GODARD 43–55 (1985).

192. BAZIN, *supra* note 174, at 17.

193. Carol Clover, *God Bless Juries*, in REFIGURING AMERICAN FILM GENRES 255, 257 (Nick Browne ed. 1998).

194. MAST, *supra* note 179, at 30–31.

195. For a discussion of the trial film genre, see e.g., Jessica Silbey, *Patterns of Courtroom Justice*, 28 J.L. Soc'y 97 (2001) [hereinafter Silbey, *Patterns of Courtroom Justice*] (discussing how the film genre of the courtroom drama is identifiable by certain common traits throughout its 100 year history, one of which is its establishment of certain expectations in its audience regarding each individual's role in assuring law's promise of justice); Jessica Silbey, *The Subjects of Trial Films* (1999) (unpublished Ph.D. dissertation, University of Michigan) (on file with author) [hereinafter, Silbey, *The Subjects of Trial Films*] (tracing the history of the trial film as a film genre and its construction of popular legal consciousness).

climax to solve the crime.<sup>196</sup> This self-referential gesture—making film the star of the film around which the film's story (here, about law) is structured—is crucial to film's way of worldmaking and its history as a medium.

As seen explicitly in *Falsely Accused!*, film's self-reflexive quality enables its dual characterization as evidence (of some event or happening) and the story of evidence (how one comes to know). Scores of later films, and not only films about law or crime, contain this same mark of the 20th century medium.<sup>197</sup> And, as already shown in the cases *supra*, e.g., with the murder of Barbara Cromwell and the day-in-the-life of the rehabilitation of Mr. Thomas, the case law's treatment of filmic evidence unconsciously tracks this understanding of film. Film is described as both the revelation, "what happened," and as only one version (albeit the most important version) of the larger evidentiary puzzle. The case law nevertheless omits what is otherwise central to film's self-conscious quality; it enables the critique of film's capacity to reflect or represent real life.

Much like the first-person narrative film served dual tendencies—to subvert film's projection of omniscience as well as to root film's meaning in the individual subject—film's self-reflexive gestures served at least two similar purposes. On the one hand, *The Magic Lantern's* story of film on film undermines the sense in which film may be considered to be a thing apart (uniquely truthful, or mimetic) from other forms of representation. On the other hand, the example of self-reflexivity in *Falsely Accused!* bolsters the experience of film as a mechanism for revelation and truth-telling. Although the film gestures at its own constructedness—by featuring the film camera as the source of the story's narrative thread—it nevertheless glorifies the capacity of film to reveal and clarify the world, absent any bias or perverting gaze.<sup>198</sup> Indeed, *Falsely Accused!* perpetuates the notion that, once the elusive point of view (the undeveloped film) is expressed or displayed, all the puzzle pieces will come together in a coherent story. In this way, self-reflexivity in film enables both a critique of film's fictive nature and the confirmation of film as an objective form of knowledge. Spectators understand that what they are viewing is a point of view—a filmic

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196. Clover, *supra* note 193, at 257. This description of film's revelatory nature is not unlike the description in the cases above, such as *Carpenter*, the case of the murder of Barbara Cromwell, or *Guerrero*.

197. For this trait in trial films specifically, see Silbey, *Patterns of Courtroom Justice*, *supra* note 195, at 97–98. For self-referential films generally, see STAM, *supra* note 191.

198. To some film scholars, the incorporation of self-reflexivity into the film's meaning making and process of judgment is central to the medium's formal qualities, as well as one of the reasons for film's affinity to the legal process. See Silbey, *Patterns of Justice*, *supra* note 195, at 97–98; Silbey, *Subjects of Trial Films*, *supra* note 195, at 3–4 and ch. 3.

point of view—and, because they are made aware, they feel capable of making judgments about what they see as true. The end result is, therefore, that the experience of film is less about the quality of the information film conveys about the thing or event filmed, but about identifying the film's point of view and, through that identification, being able to judge the source and making of the film itself.

4. *Moving Pictures versus Photographic Stills*—In light of this history and theory, it seems clear that the admission of filmic evidence on the basis of its photographic cousin (as in Carpenter and Albert, *supra* Part I(B)(1)) is error. Thinking even briefly about the differences between photographs and film leads to the conclusion that film footage is not the substantial equivalent of still pictures, even when the photographs ostensibly depict the same objects or scenes as does the film. Intuitively—referencing only the above film theory and without reliance on established theorists of photography, such as Susan Sontag, Stanley Cavell or Roland Barthes<sup>199</sup>—it is apparent that there is a significant difference in the interpretive processes activated and the meaning culled from flipping through a photograph album and watching a film or video. Some crucial and obvious differences in form are, for example, film's motion (think of *L'arrivéé d'un train en gare*), the film's fixed narration (be it implicit in film editing and camera perspective or explicit with voice over), the film's (most often) linear time chronology as compared to a photograph's a-temporal context, and the film's animate and contemporaneous quality as compared to a photograph's static and timeless aspect. Barthes describes a photograph, as opposed to film, as a "floating" image because it rarely roots its meaning in a preceding or subsequent photograph. For this reason, whereas the narrative (or narratives) of the photograph is contained in its four corners, it is much more difficult to fix. Even though film has more interpretive variables—for all intents and purposes, it is a set of thousands of photographs—film exudes a more predetermined (even ideological) narrative from its controlled spectatorship. The case law's analogy of photographs to moving pictures is inapt. The interpretation of film requires its own method with attention to its own peculiar history and form.

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199. See generally ROLAND BARTHES, *THE RESPONSIBILITY OF FORMS: CRITICAL ESSAYS ON MUSIC, ART, AND REPRESENTATION* (Richard Howard trans., Hill & Wang 1985); ROLAND BARTHES, *CAMERA LUCIDA: REFLECTIONS ON PHOTOGRAPHY* (Richard Howard trans., Hill & Wang 1981); SUSAN SONTAG, *ON PHOTOGRAPHY* (1978); STANLEY CAVELL, *A WORLD VIEWED: REFLECTIONS ON THE ONTOLOGY OF FILM* (1971).



### B. The Film's Witness

At the heart of the case law analyzing the admissibility of filmic evidence appears to be the courts' preoccupation with insuring that the trial result in an accurate verdict. This is not the whole story, however. As said earlier, these same courts characterize filmic evidence as bearing witness to certain critical events at issue in the case, as serving as an eyewitness of sorts.<sup>200</sup> Whether that film as eyewitness is believable and how courts assess that believability remains unexplained in the case law.

In writing about evidence law, Professor Richard Friedman has confirmed that certain humanistic policies underlie evidentiary rulings. Specifically, he suggests that often the real reasons for excluding or admitting evidence "are related not to a desire to ensure factual accuracy, but to the common law system's orientation toward individual rights."<sup>201</sup> Friedman explains how the development of certain evidentiary principles, such as spousal privilege and the limitation on evidence of character and prior bad acts, is not founded on the jury's inability to consider the evidence properly, but likely on the near-sacred concept of the individual in the common law, "of personal right, and the role of the legal system as its protector."<sup>202</sup> Similarly, at the core of the prohibition against hearsay, Friedman argues, is the right of every defendant to come face to face with his accusers.<sup>203</sup>

The foregoing abbreviated discussion of film theory suggests much the same thing. Film narrative developed, and its experience confirms, that meaning making through film is based, at least in substantial part, on the conception of film as a witness. It theorizes that the film experience is based upon the film embodying a particularly coherent and believable point of view—a mind, of sorts—that can be understood, even appreciated, and perhaps, at times, it can function as a worthy opponent for criticism and interrogation. When that mind or witness for which the film stands is unknown or unreliable, the film is excluded, such as with the case of the vaudeville

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200. See *Call Northside 777*, *supra* note 6, at 387. Mnookin and West speculate that filmic evidence "turns the spectators into virtual witnesses." But, of course, film spectators are only witnesses to film and nothing else. If film history and theory teaches anything, it is that film audiences are not seeing the event being filmed. They are seeing only the filmed event. Conflating the jury "see[ing] for itself," *id.*, with the jury seeing the *film* for itself is therefore a mistake of phenomenology.

201. See Richard D. Friedman, *Anchors and Flotsam: Is Evidence Law "Adrift"?*, 107 YALE L.J. 1921, 1928 (1998) (book review).

202. *Id.* at 1937, 1939.

203. *Id.* at 1939.

performer in *Gibson v. Gunn*, where the court criticized the “absence of evidence as to how this particular motion picture film was prepared.”<sup>204</sup> The aged doctrine of admissibility of filmic proof requiring an authenticating witness derives from these early cases expressing suspicion of the filmic medium and its disembodied testimony.<sup>205</sup>

Through the twentieth century, increasing comfort with the filmic medium as a form of communication as well as a kind of evidence has led to the advocacy of the “silent witness” theory in which a film “speaks for itself” rather than merely illustrating the testimony of a courtroom witness.<sup>206</sup> The film no longer dovetails on a percipient witness’ authentication, but asserts in its own right. This is most obviously the case with automatic surveillance cameras.<sup>207</sup> It is less obvious, but similarly present, in the case of day-in-the-life films and expert videos insofar as either genre of filmic evidence is inadmissible when the filmic evidence is characterized as unreliable and assertive.<sup>208</sup> In these circumstances, the film is considered substantive evidence on the basis of the reliability of the process by which it was made (*i.e.*, as a credible or incredible source of information) rather than as corroborated by an eye witness’s testimony.<sup>209</sup>

What remains unclear by the shifting evidentiary landscape, then, is whether in “speaking for itself” the film as its own witness has any more or less credibility than would a witness who otherwise testifies in court subject to cross-examination. The shuffle between the evaluation of filmic evidence as demonstrative or substantive evidence muddies its status vis à vis other forms of traditional evidence. From the cases discussed *supra*, it appears that courts consider *evidence verité* and even some staged-and-scripted films as garnering as much (or even more) weight and authority as a percipient witness who testifies at trial and is subject to cross-examination. This is so, despite the basis

204. 202 N.Y.S. at 20. This was also the case with *Fusco* and *Thomas*, the former being criticized as too staged a rendering of events and the latter being criticized as too partial. The opposite was true of the film-as-witness in *Carpenter*, *Guerrero*, and *Beeler*. There, the films were considered the penultimate eyewitnesses revealing the truth at the heart of the trial—who committed the crimes and how.

205. See *Paradis*, *supra* note 8, at 236. See also *UAW v. Russell*, 88 So. 2d 175, 186 (Ala. 1956) (“The motion picture does not of itself prove an actual occurrence but the thing reproduced must be established by the testimony of a witness.”); *Beattie v. Traynor*, 49 A.2d 200, 204 (Vt. 1946) (“A photograph . . . is merely a witness’ pictured expression of the data observed by him . . . and its admission, when properly verified, rests on the relevancy of the fact pictured.”); *Wigmore*, *supra* note 115, at 218–19 (“[T]he mere picture . . . cannot be received except as a non-verbal expression the *testimony of some witness* competent to speak to the facts represented.”).

206. See *supra* note 115, at 220, and accompanying text.

207. See *supra* Part I(B)(2)(b).

208. See *supra* Part I(C).

209. Herlihy, *supra* note 45, at 149.

for admitting the film as purely illustrative (“demonstrative”) and the lack of any cross-examination of the filmic proffer (as opposed to the sponsoring testimony) for its particular interpretation and point of view. This conclusion must be inferred from the brief evidentiary discussions in the case law, however, because they lack any analysis of the filmic medium, either as a credible fact witness or as a kind of mind with a discernible, subjective perspective. It is this kind of evaluation of the filmic evidence that is next considered.

### PART III. REVISITING THE CASE LAW

Revisiting the courts’ analyses of the use and admissibility of filmic evidence in light of basic principles of film theory and history may not always result in different legal outcomes. Doing so will nonetheless make consistent an otherwise murky evidentiary doctrine and will surface otherwise implicit jurisprudential debates about what trials do and how they should function. Being explicit about how evidence accumulates and is choreographed at trial demonstrates that the chief role of the public trial is not to solve a mystery as much as it is to reenact (and thus reaffirm) principles of fairness and judicial integrity. Also, putting pressure on evidentiary categories begins to reimagine film less as an unproblematic conduit of information and more as it has been considered throughout history, as both fantasy and spectacle.

#### A. *Evidence Verité*

1. *The Bird Men*—Returning to Marvin Carpenter and his goldfish for a moment, recall that the court considered the filmic evidence of the bird pits cumulative of admissible testimony, but also clarifying and dominant.<sup>210</sup> Further, the court failed to give instructions on the jury’s careful attention to the video leaving implicit its evidentiary status as either demonstrative or substantive. Unlike most of the other evidence admitted at trial that is accompanied by instructions for its weight, use, and relevance, the videotape of the crime scene footage

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210. *Carpenter*, 933 F.2d at 751. The Court fails to say what the filmic evidence specifically clarifies; readers are left to assume it clarifies the facts of the crime and, inferentially, Mr. Carpenter’s guilt.

was described merely as explanatory (of other admissible evidence) or clarifying (of what?) and left at that.<sup>211</sup>

Questions arise for trial courts charged with following the law of superior courts: should juries consider the crime scene footage as merely corroborative and thus be told to ignore the details it depicts that were not testified to? Or is the film substantive evidence, considered for the truth it asserts, whatever that could be said to be? If substantive and assertive, who asserts? Whose capacity should the jury test: the film's or the film maker's? The basic tension lies between the rule that crime scene film footage should be limited to no more than a corroborative role, on the one hand, and an acknowledgment that filmic evidence brings much more to bear on the case than corroboration of testimony, on the other. Blindly sticking to the idea that films are mostly corroborative of testimony ignores the film's difference from oral testimony. As the most obvious example, its visual aspect incorporates more details than testimony ever can. Perhaps less obvious, the apparent inability to cross-examine the film, to test its accuracy in the usual and customary ways, also distinguishes the film footage from the testimony of a live witness. Understanding that films are testimonial and assertive, however, would require a foray into the very complicated and less familiar methods of interpreting the representational strategies—the meaning making—of film, something courts seem unwilling or unprepared to do, despite a well-developed scholarly field of film criticism that does just that.<sup>212</sup>

Buried in the *Carpenter* court's conclusory analysis that the filmic evidence was not more prejudicial than probative, and that it was a credible, unbiased illustration of the crime scene, is crucial information about the film that supports the defendant's appeal: the film was one and one-half hours long and presented from a single point of view.<sup>213</sup> Ninety minutes is the length of many feature length films. There must be details in that long film on which the defendant or court could have focused an analysis in support of Mr. Carpenter's appeal on the basis of the film's prejudice. For example, were there any close ups or an implicit (or explicit) narration of the film? From whose perspective was the filmic story being told? Was the film in black and white or color? Was it in focus—wide angle or deep? Was it edited, cut, and spliced? These are traditional questions asked when attending to film form and its narrative structure, the genesis of which dates from the development of montage in the Soviet Union and the

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211. *Id.*

212. *See infra* Part III.

213. 933 F.2d at 751.

beginnings of American cinema in the hands of D.W. Griffith. Any one of these formal qualities of film could have supported Mr. Carpenter's argument that the film was assertive (told a particular story rather than the definitive one) and tended to unduly and with bias emphasize certain gory details of the crime scene without good reason or purpose.

Although, surely, the federal marshals who executed the search warrant and filmed the video could have (and likely) testified to the same or similar gory details, the prosecutor's reason for admitting the film, in addition to the testimony, is because of the implicit understanding that film produces the effect in its audience of being present at the search of the bird pits. Far from being proffered as merely an illustration of "a" point of view of the crime scene (*i.e.*, the perspective of the federal marshal who uncovered the crime, camera in hand), the film of the bird pits is presented and felt as "the" authoritative point of view—indeed, as the only point of view. Importantly, the viewing of the film is presented and experienced as what the jury would have witnessed themselves had they been present at the uncovering of the crime. Without questioning the objectivity of the film, which perspective the court adopts as a naïve film viewer, the jury is free to assume that the film is a window to the crime scene, without opinion, inflection, or interpretation.<sup>214</sup>

But the film is not a window to the crime scene. The film of the bird pits tells only a partial story, just like the film of the train arriving into the station in France told a partial story: the Lumière brothers' version of a train's arrival into its quay.

For all their appearance of recording unstaged, spontaneous, real events, the Lumière films subtly incorporate the conventions of two artistic traditions that would powerfully influence the movies to follow. First, the Lumière films are very carefully composed, with symmetrical balancing of the left and right edges of the frame and interplay between the foreground and the deep space perspectives of the background (especially for those actions that move directly toward or away from the camera). . . . Second, the Lumières organized their filmed events as little stories according to the most basic narrative pattern of beginning, middle, and end. [The Lumière] films, as brief as they are, do

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214. One might ask whether it matters if these kinds of questions are asked. Would the result of the trial have been any different? Presumably, this is just what the court thought. The point here is that the result could have been different and that, even if it was not, at least the film would be perceived for what it is, a testimonial proffer subject to cross-examination rather than the last word on the issue.

not usually begin with the event or action in progress. Instead, the camera establishes the scene before that action starts; then the event occurs, and only after the movement has terminated does the camera quit the scene.<sup>215</sup>

In an analogous way, the film of the bird pits was one version of Mr. Carpenter's crime. Far from impersonal or impartial, far from unmediated, the film of the uncovering of the bird pits was testimonial in nature; it was an argumentative and assertive version of how Mr. Carpenter's bird pits came to be. Its point and its positioning—indeed, its description by the court—was to expose the details of the crime from the perspective of an innocent witness, someone stumbling, horrified, upon the bird pits for the first time. The ninety-minute length of the film imposes the quality of staring into the pits by its imagined viewer. No doubt that staring was at the “bird carcasses in an incinerator,” and the “decomposed bird remains, bird feathers and charred bird parts.”<sup>216</sup> Echoes of a holocaust ring in this description; no doubt the films horrified their audience—the judge and the jury—as intended.

But what of the likely unstable movement of the camera during these ninety minutes? What of the clarity (or lack thereof) of the filmic images? And what of the time spent filming the rotting bird bodies rather than the devastation and impoverishment of the surrounding farmland? Without pushing back against the “explanat[ion]” provided by the film of the bird pits, the court sanctions the film as the authoritative story of what happened and who is to blame. Unsurprisingly, this translates into a *de facto* guilty verdict supplied by the judge and ratified by the jury. Instead of leaving the interpretation of the film to the jury by encouraging the close examination of the film for its constructed nature and its mediated story, as would be required with the testimony of an eye witness, the court permits itself to deem the film credible and unimpeachable without further investigation by it, opposing counsel, or the fact finders.

This is a fundamentally different role for the judge at trial. It suggests that the court is more concerned with the outcome than the process, more about coaxing the truth from the trial than safeguarding the fairness of its play. Rhetorically described as functioning to reveal the truth of the matter in dispute, the trial is nevertheless also implicitly constituted as a representational endeavor requiring the court's strong, interpretive hand. By vouching for the integrity of the filmic representation, the court self-consciously controls the story

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215. *MAST*, *supra* note 179, at 26.

216. *Carpenter*, 933 F.2d at 751.

being told, and, by failing to offset the films' perception of objectivity and completeness with an examination of the film's implicit point of view and its assertive, emotional qualities, the court undermines the hoped for evenhanded nature of the adjudicative process. It also wholly ignores what film theory (and film goers) understand to be the pleasure and peril of the cinematic form: its combined sense of immediacy and vitality with its underlying fiction and theatricality.

2. *The Murder of Barbara Cromwell*—A reevaluation of the evidentiary analysis in the case of the Government of the Virgin Islands against Nicholas Albert picks up these same themes. Recall that when ruling that the filmic proffer of the crime scene was admissible evidence, the trial court required the excision from the film of the "opinionated narration." It then admitted the moving pictures on the coattails of twenty-four photographs that the court presumed to tell the same story.<sup>217</sup> Despite the lack of sound, however, the court failed to recognize that there remained a narrated and opinionated content to the film from the perspective of the camera: its focus, angle, and movement; and, unlike the photographs, the film told a purposeful and pointed story about the violence of the burglary from the point of view of the filming, investigative officer. The most obvious example of the film's "impos[ition of] its interpretation of [the] event"<sup>218</sup> comes at its conclusion. After a steady tour through the ransacked condominium, the film contains a 12–15 minute still-shot—an effective pause in an otherwise fluid video—that focused exclusively on Barbara Cromwell's genitalia. This pause likely corresponds to the filming officer's perverse fantasy and horror at Barbara Cromwell's nakedness, which has little, if anything, to do with the case against Nicholas Albert.<sup>219</sup>

Despite the excision of the voice-over narration, the court is wrong that this 12–15 minute pause does not constitute a narration in kind, a commentary or an "opinion."<sup>220</sup> A 12–15 minute static shot in a forty-five minute videotape that otherwise continuously pans around the crime scene tells the jury, without saying it with words, that the focus of that 12–15 minutes is important. This contrasts with the admission and viewing of the photographs, among which the jury could decide which photographs it would view longer than others and which were more relevant to the matter to be decided. The horror and fascination of the police officer at Barbara Cromwell's nakedness was communicated loudly and clearly without any basis for its relevance to the

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217. *Albert*, 241 F.3d at 348–49 (citations omitted).

218. BAZIN, *supra* note 174, at 26.

219. *Albert*, 241 F.3d at 349–50.

220. *Id.* at 348.

crime. The lack of overt narration, despite the purpose behind the court's instructions, does not mean that the film fails to convey an opinion.

In addition, the pause in the filming of the crime scene, a break so noticeable that the appellate court commented on it, exposes the film's constructed form and undermines its appeal to transparency and objectivity. In films of the early 1900s, such as Melies' *The Magic Lantern*, a film's nod to its maker would undermine its illusion of total cinema and challenge its viewers to consider the film's framing and its excluded content in order to facilitate a knowing judgment of the film's story.<sup>221</sup> Here, however, the film's editing and pacing is naturalized, even personified, as an unbiased eyewitness to the crime with perfect memory.

The concurring judge (concurring in judgment but dissenting in the admission of the videotape) says so explicitly. In describing what he believes is the relevant difference between the film and the 24 photographs, he comments on the film's appeal to voyeurism and the emotions its voyeurism affects, saying the tape "has an emotional impact almost equivalent to rendering the viewer a *participant in the crime itself*."<sup>222</sup> Notably, this judge writes separately to criticize the admission of the filmic evidence due to its gore and emotional impact, but concurs in the judgment apparently believing that the jarring experience of the film did not skew the verdict.<sup>223</sup> In other words, like so many other cases, the concurring judge believed that the film's depiction of the crime sufficiently coincided with the other evidence at trial to render any influence it has on the verdict, however great, immaterial.<sup>224</sup>

The concurring judge's suggestion that the film renders "the viewer a participant in the crime itself" overstates the case. Watching a film of the after-effects of a crime does not make its audience criminals; it might horrify, generate fear and guilt, and even anger and violence, but watching footage of a crime scene does not repeat or reenact the crime. Importantly, it only hypothesizes the manner and timing of the crime according to the best guess of the investigating (and filming) officer. The difference is crucial to the way a court considers the relevance, role, and interpretation of filmic evidence. Here, the

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221. See *supra* Part II(A) (3).

222. *Albert*, 241 F.3d at 349 (Fullam, J., concurring in part and dissenting in part) (emphasis added).

223. See *id.* at 350 (stating, while commending the decision to suppress the "audio commentary on the tape (the cameraman's views and opinions of what was being photographed)," that the film, however horrific, portrayed what in fact happened to Barbara Cromwell).

224. *Id.*; see also *United States v. Guerrero*, 667 F.2d 862 (10th Cir. 1982).



concurring judge appears to worry that the film brings the jury to the crime itself, that the film feels too much like the crime. Instead, the film could be understood as an illustrated narration of the best hypothesis of what actually happened, the final arbiter of which is the jury, not the film maker, not the testifying officer, and not the judge. The jury could be told to interrogate that hypothesis in the same manner that prosecutors and defense attorneys interrogate oral narrations of “what happened.” The court forsakes the possibility of cross-examination and a curative instruction to the jury that would remind them that, whereas the film might feel like the real thing, it is not; at most, it gives viewers a sense of what one officer saw.

Nevertheless, this notion that film provides a mode for vicarious participation in the crime or its investigation is a common and yet unarticulated basis for admitting filmic evidence. Aside from the “merely cumulative” and “explanatory” qualities of film, courts regularly admit filmic evidence on the basis that it provides the jury with a nearly life-like experience of the event to be adjudicated. Like the spectators to that first theatrical viewing of a Lumière film, the jurors watching the film during the murder trial of Barbara Cromwell are positioned by the court as experiencing the film with real horror and fear. The film is described as a window that provides clarity of view and the jury as the voyeur with permission—indeed authority—to stare. In light of the not unproblematic assumption that the film’s depiction of the events or facts at issue is the closest the jury will come to seeing with their own eyes the event or thing itself, that film is indeed the perfect “eyewitness,” courts, as here, suggest that the sensation of voyeurism created by the filmic medium affects good judgment.

This basis for admissibility of *evidence verité* is most troubling in light of the lessons of film theory and history: that one of the pleasures of cinema is making each spectator feel as if he or she is an eyewitness, despite that impossibility.<sup>225</sup> The court reasons that film is somehow less mediated than other forms of evidence and that it is therefore more truthful and trustworthy, despite what we know of cinema’s signifying practice. Central to the pleasurable and revelatory experience of film is, on the one hand, the feeling of bearing witness to some event projected on screen based on the film’s coherent but constructed point of view and its invention of intimacy through close up and still shots. On the other hand, however, the film’s self-reflexive qualities make its audience aware of the possibility that the event as

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225. See *supra* Part II(A).

filmed may never have occurred beyond the screen itself.<sup>226</sup> The court fails to consider this second possibility and instead endows the film of the crime scene with the status of truth.

This is not to say that the scene of the murder of Barbara Cromwell did not look as it was filmed. But there was more to the murder scene than what the film emphasized, and, importantly, more that was relevant to the motive and identity of the perpetrator of the murder than “close ups of the neck area showing the cut” and the 12–15 minute still shot of Barbara Cromwell’s naked body in an otherwise 45 minute video.<sup>227</sup> The court explains that fifteen-year-old Nicholas Albert, although part of the burglary, professed innocence to the murder. Mr. Albert’s story was that, while he was ransacking the apartment, Johnny Kidd walked out of the bedroom and pronounced Ms. Cromwell dead.<sup>228</sup> The government tells a different story, illustrated by the filmic evidence.

The prosecution theorized that . . . Cromwell woke up and screamed, [and] one of the intruders slashed at her with a knife while the other blocked her escape by hitting her with a blunt object. Under the government’s scenario, while Cromwell attempted to fight off her attackers, she was overcome by a knife stab to her throat, cutting the jugular vein and severing her windpipe back to the neck bone. According to the government, it was after Cromwell’s death that Kidd and Albert tied her to the bed, jammed a washcloth into her mouth, taped her face, spread her legs open to expose her genitalia and tossed a pornographic video onto the bed, attempting to stage a sex crime which would deflect suspicion away from them. . . . Albert turned himself in to the police, admitted committing the burglary with Kidd, but blamed the murder solely on Kidd. When arrested, Kidd admitted, ‘I did it. I was the one. I cut her.’ He did not name an accomplice.<sup>229</sup>

With the defendant’s guilt highly contested, a confession by an accomplice, and the physical facts of the murder undisputed (*e.g.*, cause and time of death), the admission of the film that rehearses the brutality of the murder but that is only marginally relevant to the question presented of Mr. Albert’s innocence is harmful to the defendant, absent

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226. “If the film is to fulfill itself aesthetically we need to believe in the reality of what is happening while knowing it to be tricked.” BAZIN, *supra* note 174, at 48.

227. *Albert*, 241 F.3d at 347.

228. *Id.* at 346.

229. *Id.*

a thorough examination of the film's partiality and influence. Nevertheless, the appellate court agreed that, once the "opinionated" content of the film's voice-over was excised, the videotape was admissible as "clearly relevant to demonstrate the government's theory that one small man could not have subdued a struggling Cromwell and have inflicted the massive injuries upon her unassisted."<sup>230</sup> Moreover, the court explains that any "error which may have been caused by the admission of the videotape was harmless given the other evidence of Mr. Albert's guilt."<sup>231</sup>

This harmless error gloss avoids wrestling with the important fact that Mr. Albert admitted only that he helped Johnny Kidd tie up Ms. Cromwell in order to facilitate the robbery and that he did not participate in her death.<sup>232</sup> It also ignores the fact that excising the voice-over narration failed to cure the film of its opinion that Mr. Albert was Johnny Kidd's accomplice in Ms. Cromwell's murder. The court all but admits as much when it declares the film "clearly relevant" (*i.e.*, substantive rather than demonstrative) beyond the two dozen photographs of the same crime scene to the issue of Mr. Albert's guilt.<sup>233</sup> The court should have required a closer evaluation of the film to test the government's story or Albert's explanation—what would be an effective cross-examination—especially given the court's admission that "there [was] no question that [the film] was gruesome . . . disconcerting."<sup>234</sup> Indeed, the jury appears to have struggled with the film: "While deliberating, the jurors asked to see the videotape again."<sup>235</sup> But there was no instruction and no urging on the part of the court that would guide or otherwise mediate the interpretation of the film. Instead, the film was declared "clearly relevant" to the government's case against Nicholas Albert. Albert was found guilty and sentenced to life without parole.<sup>236</sup>

One might wonder what a cross-examination of filmic evidence of this type would entail. The analysis of the videotape during the first Rodney King trial is exemplary in this regard. As film scholar Bill Nichols has written, the outrage of the not-guilty verdict in the first Rodney King trial relies "on the positivist fallacy [that] . . . the videotape offered the proverbial smoking gun. The prosecution could treat its images as raw evidence, as incontrovertible answer to a carefully formulated and often debated question: When are the police out of

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230. *Id.* at 349.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* (emphasis added).

235. *Id.*

236. *Id.*

control? . . . The prosecution chose to treat the tape as evidence [of the police officers' guilt], exposing itself to compelling counter-arguments that it was no such thing.<sup>237</sup> As in the cases against Mr. Carpenter and Mr. Albert described above, the prosecution in the first Rodney King trial thought of prescribing no other meaning to the filmic evidence than its indexical reference to the guilt of the defendants. However, the defense attorneys in the first Rodney King trial were more sophisticated and imaginative; they were savvy to filmic ways of constructing meaning. Nichols describes how the

defense lawyers systematically set out to construct an interpretive frame in which the videotape itself would serve as confirmation . . . [o]f the rough and brutal nature of police work . . . [and of] the dire necessity of controlled force to safeguard the men in blue and preserve the lives of suspects who might otherwise be killed. The overall defense strategy . . . present[ed] a cogent, coherent, convincing interpretation [of the videotape]. . . . The lawyers argued that the officers did not just start beating Mr. King out of the blue as the videotape implies. Important, mitigating events occurred before the tape began. These events could be interpreted to portray Mr. King as a dangerous suspect who required felony arrest (which, in turn, mandated the 'proned out' position flat on the ground that Rodney King failed to assume). The video then demonstrates the determined, casebook efforts by well-schooled cops to arrest a potentially violent man without resorting to deadly force.<sup>238</sup>

Although this interpretation seems implausible in light of what many people understood to be rampant abuse of power of Los Angeles police officers towards their citizenry, the defense attorneys in the first Rodney King trial nevertheless convinced a jury that the events that occurred before the film began and that occurred beyond the film frame changed the story of brutality that the film otherwise told.

The defense attorneys in the first Rodney King trial also slowed the film's viewing to a frame by frame inspection in order to test the presumed causality imbedded in the real-time film narrative. Frame by frame, the defense attorneys asked the testifying officers, who were also watching and narrating the film, whether they or Rodney King were in

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237. BILL NICHOLS, *BLURRED BOUNDARIES: QUESTIONS OF MEANING IN CONTEMPORARY CULTURE* 22–23 (1994).

238. *Id.* at 25.

control of the precipitating event. By stopping the film and interrogating the officer about each King movement and L.A.P.D. response, the defense attorneys reinterpreted the film as one in which “the officers [were] consistently respond[ing] to King’s actions. They were always on the defensive; they feared for their lives.”<sup>239</sup> “Although not immediately compatible with many people’s imagined relationship to justice, [this] proved quite plausible to the Simi Valley jury, very possibly for reasons other than their own preassigned racism.”<sup>240</sup>

Through the example of the Rodney King trial, this Article does not propose that every proffer of filmic evidence be subject to the kind of reinterpretation that occurred there. The author does suggest, however, that the meaning of filmic evidence not be presumed transparent, uncontroversial, or fixed. The kind of sophisticated attentiveness to film form and narration demonstrated by the defense attorneys in the first Rodney King trial, at least, shows that the verdict of the case is (as it should be) always up for grabs before the trial begins.<sup>241</sup> Judges need not narrate the evidence or liken a filmic proffer to an eyewitness in order that the film be admitted as substantive evidence at trial. Judges need only to perform as film critics, by enticing the parties to look closely and methodically at the filmic proffer for what it does and does not say.

“No image can *show* intent or motivation. Images, whether in real time, slow motion, or freeze frame, can, however, help corroborate a narrative account of what happened. This corroboration is best supported by close scrutiny and careful analysis. [The Rodney King tape] is raw footage, the latent pearl in the oyster. It does not speak for itself.”<sup>242</sup>

3. *The Pipe Bomb*—In light of the Rodney King model, consider *U.S. v. Beeler*, the case of the tailpipe bomber. The court’s simple con-

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239. *Id.* at 24–25.

240. *Id.* at 23.

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The defense argument appeared to fly in the face of common sense. But it took the *form* of a positivist, scientific interpretation. It did what any good examination of evidence should do: it scrutinized it with care and drew from it (apparent) substantiation for an interpretation that best accounted for what really happened. That the form of interpretation used by the defense fit such a classic mode—especially the revelation of a “true” reality beneath the deceptive certainty of surface appearances by means of special techniques like slow motion and freeze framing—may be a major reason for its success in the first trial. (It was not until the second, federal trial that the prosecution adopted an equally impressive form for the interpretation of the evidence.)

*Id.* at 30.

242. *Id.* at 33.

clusion that the duplicated, enhanced, and edited surveillance tape of the interaction in the Mini-Mart is “accurate” and “authentic” implies, first, that the two tapes mean the same thing, even though the images on both tapes are not identical and were not made in the same way or for the same reasons. In effect, the court tells the jury that these admittedly different (although related) representations of the event at the Mini-Mart signify the same. This is not the case in most studies of representation—be it literature, film, painting or prose—disciplines that teach the process and requirement of interpretation and attention to form in order to derive meaning from communicative representations.<sup>243</sup> Law is no different. The reason a trial takes place is that the evidence adduced about a single event or thing conflict. Although all the stories told at trial likely refer to the same occurrence—the crime, accident or dispute—they will be versions of one another, different in important respects so that the fact finder is left to draw conclusions in light of the judge’s instructions on the law, burdens of proof, and sufficiency of the evidence. In other words, all testimony, such as *evidence verité*, is a version of what happened. If a judge could determine that one version of the story is merely a duplicate of the other, as in *Beeler*, what would be the point of the trial at all?

As in the *Carpenter* case and the case of the murder of Barbara Cromwell, in *Beeler*, the court bypasses any mention of the interpretative processes necessary to conclude that the film tells the whole (or otherwise dominant) story of what happened. The *Beeler* court ignores the representational strategies employed to depict images that look like real life or to make already real-life images look more real, thereby conflating both the blurry film and the film enhanced for clarity with the event at issue.<sup>244</sup>

Despite the court’s confidence, such conflation is contrary to current insight in film theory, and, as reference to the first Rodney King trial proves, the *Beeler* court’s conflation of the filmic representation of

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243. As one simple example of this principle, consider that Michelangelo’s statue of David and Bernini’s statue of David are both of the biblical figure, but they do not signify the same and they do not have the same effect. H. DE LA CROIX ET AL., *GARDNER’S ART THROUGH THE AGES* 651,758 (9th ed. 1991). As Hayden White has explained with regard to narrating history, the value of the “real” and the “true” are constructed qualities “attached to narrativity . . . aris[ing] out of a desire to have real events display the coherence, integrity, fullness and closure of an image of life that is and can only be imaginary.” HAYDEN WHITE, *THE CONTENT OF THE FORM* 24 (1987).

244. BILL NICHOLS, *REPRESENTING REALITY* 165–198 (1991) (discussing ideological tools used in film to convey “real” life). See also TERESA DE LAURETIS, *ALICE DOESN’T: FEMINISM, SEMIOTICS, CINEMA* 64 (1984) (describing corollary “that the systematic relations between picture and object of depiction are to be sought in culturally defined ‘standards of truth’”).

“what happened” with the jury verdict is not a foregone conclusion. The *Beeler* court disregards the fact that the film does not tell the whole story or even the central story. What of the significance to the verdict of that which is not caught on film? No one knows. How many perspectives are unaccounted for in the film? Many, if not an infinite number. Who can guarantee that, if another witness were present during the conversation caught on camera, that that person would see what the camera purports to show? No one. The court nevertheless hierarchizes filmic representation as primary, as compared to the other possible stories (such as the one told by the Mini-Mart clerk and the one told by the defendant). Despite these uncertainties, the filmic representation is adjudicated as more true and accurate than the spoken testimony that is based on memory and is subject to cross-examination in front of the jury.

Motivating any good cross-examination and missing from this and other legal analyses of *evidence vérité* is the understanding that film is as ideologically structured as any other communicative medium.<sup>245</sup> Film, like other forms of signifying practice, is constructed and conventional, according to norms of viewing and interpretation.<sup>246</sup> An often cited example of an arbitrary and conventional signifying system that is nevertheless relied upon as revealing an underlying truth is the famous Rene Magritte painting *Ceci n'est pas une pipe*.<sup>247</sup>

Magritte's painting comments on the illusion of reality in the fine arts—how the representation of the real is ideologically constructed. What looks “real” and “true”—identifiable as the thing to which the painting refers—only appears real according to established norms of what “the real” should look like. Those norms—in Magritte's case of perspective drawing—are shaped by the people composing the art; and those norms can change.<sup>248</sup> The same is true with film.<sup>249</sup> One of

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245. STAM, *supra* note 172, at 186–87 (“Ideology and the Camera”); Baudry, *supra* note 187; Bazin, *supra* note 174, at 17 (“Cinema is an idealistic phenomenon.”).

246. DAVID BORDWELL, MAKING MEANING: INFERENCE AND RHETORIC IN THE INTERPRETATION OF CINEMA 8 (1989) (theorizing that film spectators make sense of film in one of four ways).

247. *Ceci n'est pas une pipe* translates to “This is not a pipe.” For an analysis of this painting in light of 20th century language theory, see MICHEL FOUCAULT, THIS IS NOT A PIPE (James Harkness trans., U. California Press 1982). For a reproduction of Magritte's painting, go to <http://dubhe.free.fr/gpeint/magritte6.html>.

248. See generally ERICH AUERBACH, MIMESIS: THE REPRESENTATION OF REALITY IN WESTERN LITERATURE (1953) (discussing conventions of mimesis—imitating reality—through the development of art and literature); E. H. GOMBRICH, ART AND ILLUSION, A STUDY IN THE PSYCHOLOGY OF PICTORIAL REPRESENTATION 3 (1969) (devoted to the question how “is it that different ages and different nations represented the visible world in such different ways?”).

249. See NICHOLS, *supra* note 244, at 32–76 (examining the styles, strategies and structures of documentary film).

film's founding gestures and a cornerstone of its ideological message, its epistemology, and its pleasure, is that it convinces its viewer that they are witnessing with their own eyes the event the film portrays. Remember the Lumière film *L'arrivée d'un train en gare* and its audience running from the theater for fear that the train would run them down. Remember, too, Melies' film *The Magic Lantern*, teaching its audience that, despite film's illusion of transparency, the filmic art is just one in a long line of aesthetic practices that aims to say something about the world through its own conventional practice and strategy of mimesis that inflect the subject being told. The inauguration of the first person narrative into film, blurring its subjective and objective perspectives, and implying a centered subject around which the seen world is organized, furthered this play of illusion and knowledge through the primary sense of sight.

What this study of film tells us is that meaning in film depends as much on *how* film conveys images as to what those images refer. Just as Magritte's painting is not about its content (a pipe) as much as it is about how its audience is trained to know what a pipe (or some other object) looks like through artificial and conventional modes of drawing, film theory teaches that a film's meaning derives from its own conventions, *e.g.*, its edited montage structure and its projected point of view isolating a subjective position that is only one among many. By contrast, in a legal arena, *evidence vérité* is perceived as *the* point of view emitting a uniform meaning for the case at hand, devoid of editing or constructed or ideological perspectives. Whereas the formal qualities of feature films—light, angle, focus, and editing—may serve to make its viewers self-conscious of its constructed and fictional nature to enhance the pleasure of the film, these same formal qualities in films at law—fuzzy pictures, sharp camera angles, hand held cameras—imbue the film less with a fictional air than with a true one. Whereas these formal characteristics of film highlight its filmic nature (not its reality), they nevertheless provide the evidence at trial with the gloss of the “real” rather than the “representational.” To the courts herein described, therefore, the proffer of filmic evidence as a demonstrative aid rather than as assertive, substantive testimony obviates any need for interpretation or intervention as to all the ways the film might otherwise be meaningful for the case at hand.

In the case of the tailpipe bomber (as with Mr. Carpenter's bird men and Ms. Cromwell's murder trial), the *Beeler* court's holding is naïve to these studies of film and the arbitrariness of its signifying practice, furthering its myth and its ideological play by implying that the jury is free to assume that, in the enhanced version of the surveillance tape, the



jury is seeing what it would have seen had each juror been at the convenience store that same day. This instruction capitulates to the blurring of the subjective and objective positions of the camera. Consider how impossible this is. The facts of the case (an automated and stationary camera) are such that there existed no possibility that anyone but the camera “saw” and “remembers” the Mini-Mart customer whose identity remains deeply disputed. The camera does not show a human perspective of the conversation; the camera “saw” things from the ceiling—a perspective no person would ever occupy—and “remembers” grainy and blurry images, which are not forms of images created or remembered by the human brain. Consider also that there is a witness who was there that day who can testify to an interaction with the suspect the government alleges is the defendant. Unfortunately, however, that person’s memory—like the camera’s—is restricted. He can only testify to general details: height, hair color, and physique. Crucially, he cannot provide testimony on the key issue of the case: the identity of the convenience store customer as compared to the defendant on trial. However, neither can the film. Nevertheless, the court demotes the import of the live witness to second place and elevates the enhanced filmic version of events to the status of truth, thereby participating in an ideology of filmic realism, accepting film’s representations as impartial and true. It does this by admitting the enhanced film as substantive evidence of the defendant’s identity without the possibility of a rigorous cross-examination of the film—its comparative visions (blurry vs. enhanced)—and without any corroborating evidence.<sup>250</sup> Further, the court allows the prosecution to use the filmic evidence to impeach the only live witness to the conversation.

These courts’ discussions of *evidence verité* reflect two related uses of filmic evidence. First, the film’s meaning is transparent and uncontroversial. Second, the film, like an eyewitness but much better (*e.g.*, objective and unbiased), can speak for itself as to its unique relevance and detail absent corroboration through testimony or other evidence. Together, these descriptions of filmic evidence embed contrary notions of the trial function. On the one hand, the film’s meaning is transparent and uncontroversial because the court has imposed on the evidence an inevitable conclusion: from the trial must emerge the truth of the matter. On the other hand, the film is analogized to a human witness—albeit the perfect witness who does not lie—around

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250. Enhancement requires judgment-decisions about which lines to make clearer, which shadows to erase and which to make darker. “Enhancing” in this way is not unlike the craft of a sketch artist. That a court would hold an enhanced videotape a “duplicate” of the original under Fed. R. Evid. 1003 without further scrutiny into the interpretive enhancement processes makes little sense.

which the integrity of the trial is structured. Crucial to this structure is the factfinder's role to assess the credibility and trustworthiness of that witness, in light of common sense, personal experience, and all other facts in evidence: above all else, the trial is a fair and calculating process and based on human judgment.

These two trial functions are not necessarily in conflict, except when film is their focal point. Instead of admitting film whose apparent message coincides with the evidence at trial and excluding film whose apparent message distorts what the court believes is the right result for the jury to reach, courts might instead instruct on the weight and interpretability of film and encourage a thorough cross-examination of the filmic images, their making, and their meaning.<sup>251</sup> Doing so would require courts to relinquish the assumption that film, more or less, imparts what appears to be real life with little significant modification and acknowledge the need to explicitly guide the use (and interpretation) of film at trial, as they do with other evidence, towards a just end. In this way, the trial process (and the role of the law maker in that process) is properly perceived as less about pulling the truth from the facts than it is about monitoring how the story is told; it is about the fairness of the game being played and not about controlling who wins.

### *B. Staged and Scripted Filmic Evidence*

1. *Fusco v. General Motors Corporation*—Recall that, when excluding from evidence GM's driving tapes because they were not filmed under conditions substantially similar to the accident in question, the *Fusco* court doubts the ability of the jury to distinguish between the film of the reenacted accident with the crash that left Carol Fusco injured and her Chevrolet Chevette totaled. At bottom, the court's anxiety concerns its ability to control the meaning and effect of the filmic evidence at trial.

However unintentional, this anxiety manifests as a gloss on contemporary theory concerning the readability of literature and film, which theorizes the power of texts as polysemic.<sup>252</sup> As is common, this

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251. Some courts have suggested as much, but without precedential effect. See *Cabral v. Aruda*, 556 A.2d 47, 50 (R.I. 1989); *Sanchez v. Denver & Rio Grande W.*, 538 F.2d 304, 306 n.1 (10th Cir. 1976); *Grimes v. Employer Mut. Liab. Ins. Co.*, 73 F.R.D. 607 (D. Ala. 1971).

252. "Readability" is a term coined by Roland Barthes. See ROLAND BARTHES, *S/Z* (1970) translated as *S/Z* (Richard Miller trans., Hill & Wang 1974) (1970), which was later taken up by more contemporary literary scholars, such as Paul de Man and Jacques Derrida. "'Readerly' texts

anxiety misunderstands the thrust of contemporary theory. The arguments posited by the likes of Roland Barthes, Jacques Derrida, and Paul de Man are not that cultural texts are infinitely meaningful, but, to the contrary, that texts claim an “ongoing meaningfulness and a restricted range of significance.”<sup>253</sup> Contemporary film theorists—taking into account the specific cultural circumstances of the making, viewing, and dissemination of film—concur.<sup>254</sup> David Bordwell, for example, writes that “interpretation,” from the Latin *interpretatio*, means “explanation” and that

[c]omprehension and interpretation . . . involve the construction of meaning out of textual cues. . . . In watching a film, the perceiver identifies certain cues which prompt her to execute many inferential activities—ranging from the mandatory and very fast activity of perceiving apparent motion, through the more ‘cognitively penetrable’ process of constructing, say, links between scenes, to the still more open process of ascribing abstract meanings to the film. . . . Taking meaning-making to be a constructive process does not entail sheer relativism or an infinite diversity of interpretation. Construction is not *ex nihilo* creation . . . Both comprehension and interpretation . . . require the spectator to apply conceptual schemes to data picked out in the film.<sup>255</sup>

In other words, a film’s meaning is not out of control at all. In fact, many would say that, in part due to its inherent readability and in part due to its particular mass appeal, a film’s meaning—at least its dominant meaning—is ideologically determined.<sup>256</sup>

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claim the power to produce new meanings in ever new circumstances . . . , but at the same time they are concerned, if not to claim a single univocal sense as central to their meaning, then at least to define the range of possible meanings that they can admit, to the exclusion of other possible meanings and relevances.” 12 ROSS CHAMBERS, *STORY AND SITUATION: NARRATIVE SEDUCTION AND THE POWER OF FICTION* 26 (1984).

253. CHAMBERS, *supra* note 252, at 26 (in terms of Barthes’ readability, asserting that textual self-referentiality—what is argued as a key element of film—is the device by which “readerly” texts both multiply meanings and limit their range of significance).

254. See, e.g., DE LAURETIS, *supra* note 244, at 9 (in a collection of essays reading contemporary film in terms of certain feminist precepts, arguing that familiar filmic texts, as all films, project more than their dominant meaning, but that those meanings are culturally set up, that is, its narrative system “overdetermines identification, the spectator’s relations to the film, and therefore the very reading of the images”); FREDRIC JAMESON, *SIGNATURES OF THE VISIBLE* (1990) (reading film through his theory of the political unconscious); BORDWELL, *supra* note 246, at 8–9 (arguing for the interpretation of film as a constructive process, structured by the text’s cues and film’s particular medium).

255. BORDWELL, *supra* note 246, at 1, 3–4.

256. See *supra* note 187 and accompanying text.

So, with regard to *Fusco v. General Motors* and the substantial similarity test, is the court afraid that the film's meaning is overdetermined—the jury cannot help but see the film as the accident at the center of the trial despite the film's staged nature—or is the court afraid that the film's meaning is undetermined—the court cannot control what the jury sees in the film at all, as “no words can capture” it? It is likely impossible to determine from the panel opinion. What we do know, however, is that overdetermined, undetermined, or ideologically determined, so goes the way of language and writing.<sup>257</sup> The interpretation of film does not proceed differently, nor does the interpretation of the evidence at trial.

Language theory is surely not lost on Judge Boudin, the author of *Fusco*. Thus, it seems that there is another anxiety present, guiding the reasoning toward the outcome: the specter that legal meaning, constructed for these purposes through case law and most immediately through the trial process, is also both overdetermined and undetermined. By affirming the exclusion of the filmic reenactment, the *Fusco* court avoids wrestling with the fact that the trial itself is no more than a reenactment, a self-conscious, staged, and scripted performance. It is a “play,” as Milner Ball has written, crafted with meticulously trained data in order to persuade (desperately) its audience towards one meaning (the verdict), which is necessarily up for grabs.<sup>258</sup> But, by the time this appellate panel views and evaluates the filmic evidence, the driving tapes' vivid depiction of GM's side of the story “in a way no words could capture” makes no sense in terms of the trial's “dominant” meaning—that GM was liable for Fusco's injury. The appellate court therefore affirmed the film's exclusion given the other evidence of record.

By concluding that the filmic medium left too many interpretive possibilities unchecked for what the court knew to be the trial's outcome, or perhaps because the films compelled only one, incorrect interpretation in light of that outcome, the court shunned any latent anxiety over the potential for indeterminacy in the trial process and affirmed the trial court. It also avoided imagining the many other ways in which the relationship between GM and Ms. Fusco could otherwise

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257. See FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 65–74 (Wade Baskin trans., 1966) (setting forth linguistic theory of the arbitrary relationship between the sign, signifier, and signified); JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Gakraroty Spivak trans. 1976) (discussing the concept of *différance*, which has come to mean the inevitable production and deferral of meaning associated with language); LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO PHILOSOPHICUS* 27–29 (D.F. Pears & B.F. McGuinness trans. 1963) (theorizing how the association of a particular meaning with a word is arbitrary).

258. Milner Ball, *The Play's the Thing*, 28 *STAN. L. REV.* 81 (1975).

have been constituted, adjourning the discussion of the openness of this kind of legal meaning for another day. The *Fusco* court's critical, and somewhat contorted, analysis of film implies a perception of meaning made at trial drawn not from the interpretive possibilities of the various stories being told in light of the relevant evidence, but from the process of discovering and extracting the one truth that makes sense of those stories. This equates the trial process with solving a mystery, and the judgment of the effectiveness of that trial as whether the truth was told.<sup>259</sup> It does not appreciate the trial as a public performance with multiple open meanings which depend on audience and historical time frame; it ignores the notion of the trial as a dramatization of justice, which can be said to exist, of course, only if enacted over and over again, and never, necessarily, in the same way.

To be sure, there are plenty of cases of filmic expert demonstrations in the *Fusco* line that admit the filmic evidence rather than exclude it.<sup>260</sup> They do so evincing the same anxiety. However, the anxiety manifests, not in terms of the film derailing the judgment process by overpowering the other evidence, but in terms of the film assuring the correct judgment. Either way, the film is improperly considered "demonstrative" at the same time as it is feared for its substantive contribution, its visual testimonial.

Instead of precipitating this inconsistency, courts should admit film as substantive evidence and redirect their concerns about the film's effect on the perception and process of the trial by encouraging the careful scrutiny of the filmic evidence (a kind of cross-examination), whatever its genre. Such scrutiny would amount to an interpretation of the film's assertive statement—for what it says and how, which interpretive endeavor is already attendant to admissibility, accuracy, relevancy, and weight determinations of other similarly assertive evidentiary proffers. This kind of cross-examination of the film's assertive content would also assuage the anxiety that the meaning emanating from filmic evidence is beyond a court's (or advocate's) control. Attention to basic principles of film form and viewing, including reflection on the film's play of both artifice and references to the real, see *supra*, can help structure this cross-examination of filmic proffers

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259. Jessica M. Silbey, *What We Do When We Do Law and Popular Culture*, 27 LAW & SOC. INQUIRY 139, 156 (2002) (discussing how "truth" and "process" as regards law (and litigation, more specifically) are not necessarily antithetical and that "reality and truth—in so far as we talk about them as variables that are crucial to our decision-making process—are constructed like anything else, by the myriad of competing and complementing cultural processes at work").

260. See, e.g., *Hinkle v. City of Clarksburg*, 82 F.3d 416 (4th Cir. 1996); *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996); *Slakan v. T.C. Porter*, 737 F.2d 368 (4th Cir. 1984); *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963 (7th Cir. 1983).

and their interpretation by the jury for purposes of fair and balanced adjudication.

Interestingly enough, the case law discussing the oldest form of filmic proffers (day-in-the-life films) has gestured without precedential success toward this understanding of film in law. These kinds of films are discussed in the last section below.

2. *Day-in-the-Life Films: Old and New Paradigms*—The law regarding day-in-the-life films is developing differently from the treatment of other filmic evidence in an important way: some courts, when considering the evidentiary value of day-in-the-life films, conclude that these films are more hearsay than demonstrative, *i.e.*, independent (however unreliable) proof of some truth or fact rather than an illustrative proffer. In contrast to other instances where filmic evidence are considered illustrative or merely cumulative of a testifying witness' statements, some courts weighing the admissibility of day-in-the-life films that depict a plaintiff's injury or rehabilitation squarely address the assertive nature of the film and its independent testimonial character. As such, these courts conclude that these types of filmic evidence are out-of-court statements asserted for their truth ("This is how the Plaintiff lives day to day because of Defendant's negligence") by declarants (either the plaintiff or filmmaker) who are otherwise available to testify at trial. Moreover, the "'day in the life' film is not hearsay simply because it may depict assertive conduct[, . . . but also because it] contain[s] the 'encoded' commentary of the filmmaker, who manipulates intentional cinematic images into a kind of discourse."<sup>261</sup> This leads to the encouragement of certain discovery strategies, subpoenaing outtakes of the films and requesting that defendant's own film crew be present during the filming, as well as effective cross-examination. One commentator has ably noted that this kind of "[c]ross-examination requires not simply questioning the accuracy and motivation of the film's statements, but must first involve interpreting the film so as to make its assertive strategy explicit."<sup>262</sup>

Both of these procedural mechanisms evidence a new awareness of how film is meaningful not as revelatory, but as constructed and assertive, and, importantly, as evidence that is admissible despite its staged quality. In other words, these few courts that admit day-in-the-life films as hearsay under some exception have inaugurated a new paradigm for filmic evidence. By embracing the filmic proffer as substantive evidence, they acknowledge that, like testimony, film is discursive insofar as it imparts multiple substantive meanings. As such, it must be exam-

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261. Herlihy, *supra* note 45, at 150–51.

262. *Id.*

ined in the context of the trial, as just one of the many proffers that require explicit and critical interpretation. Although there are only a few courts that analyze day-in-the-life films this way, these courts are on the right track to properly integrating filmic evidence into the trial process.

a. *Thomas v. C.G. Tate Construction: Still the Same Old Stuff*—The case of Mr. Thomas against C.G. Tate Construction follows the old paradigm, however.<sup>263</sup> A brief review of *Thomas* in terms of the principles illuminated in Part II *supra* will further explicate the innovation of the new paradigm that this article is advocating.

Recall that the *Thomas* court excluded the day-in-the-life film of Mr. Thomas's rehabilitation because it failed to tell a balanced story of his pain and suffering and would "dominate the evidentiary scene."<sup>264</sup> Despite this criticism of the film's substantive content, the court evaluated the film as demonstrative not substantive evidence, having determined that the film illustrated testimony already admissible at trial. In the face of these contradictions—as substantive, does the film say more than the admissible testimony or, as demonstrative, is it and may it only be considered illustrative?—the court simply excluded the evidence.

When justifying its ruling, the court confirmed that the anxiety underlying the inconsistent treatment of filmic evidence is the absence of a testifying witness to confirm or authenticate the film's implied message. The court said that, although the film is excluded, "[t]he court is mindful . . . that not only will the plaintiff be available to testify, but [also] the doctor, the wife, and the therapist . . . . There is nothing to keep them from testifying as to the pain and suffering which they witnessed, or which they believed to be true because of the subjective symptoms emanating from the plaintiff himself."<sup>265</sup>

In lieu of the dramatic and evocative film—the film that "reveals" and "positively shows" the plaintiff's pain and suffering at issue at trial<sup>266</sup>—the court instead judged it better to rely on the testifying witness, whose statements the court says will confirm what the film shows. Absent an authenticating witness for the aspects of the film for which there is no specific testimony, the court stated that the film is incompetent evidence. In other words, the film's encoded and ideological meaning—not its "factual" details, but presumably its symbolic mes-

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263. *Thomas*, 465 F. Supp. at 566.

264. *Id.* at 571.

265. *Id.*

266. *Id.* at 568.

sage—lacked the embodiment of a person (or mind) through which to express or defend the interpretation of the event depicted.<sup>267</sup>

As seen before, this court's concern suggests that it believes the film's symbolic message imparts a singular and overdetermined meaning—that the plaintiff suffered extensive pain for which he should be compensated, which cannot be countered with other traditional evidence. The court's ruling also implies that the jury, unlike the bench, would be incapable of understanding the film for what it is—a filmmaker's representation of one day-in-the-life of plaintiff's rehabilitation, despite the evidence that will be admitted to give the film context and perhaps to deconstruct the film's ideological and, to use the court's own words, "dominating" content.<sup>268</sup>

This ruling in *Thomas*, fifteen years before *Fusco*, resembles that case inasmuch as one ostensible basis for excluding the films in *Fusco* was because the driving tapes were not life-like enough, but also because they were too life-like for the jury to be able to draw the necessary distinctions between the images on film and what really happened. Like the court in *Fusco*, the trial court in *Thomas* does not trust the jury with evidence made to look like "the thing itself."<sup>269</sup> Both courts, presented with different species of filmic evidence, consider these filmic proffers,

267. One commentator presents an apt example of this phenomenon:

"Consider this passage setting out different approaches to a hypothetical film of a paraplegic brushing his teeth:

There are three ways to shoot this scene. The first shot might use a wide angle showing the person in a wheelchair from a distance, and showing the general setting of the room around him. The second shot may be a close-up of the upper torso. . . . It would focus attention . . . on the humanity of the plaintiff. The third shot . . . would employ a moderate lens opening revealing in the background a shelf of drugs, ointments, and other sickroom supplies. The third shot . . . would . . . impress upon the jurors that this individual has more problems than merely brushing his teeth.

Not only does this passage illustrate the way in which the filmmaker's subjectivity can be impressed upon the jurors through the medium of the film but, more importantly, it underlines the purpose of the 'day in the life' film to present to the jurors evidence of such abstract and non-sensory 'things' as the plaintiff's humanity, his suffering, and the 'impact' of his injury. . . . To accomplish this task the 'day in the life' film uses symbols, but in contrast to the phonetic symbols of speech, the film's symbols have direct probative value in addition to their symbolic value. The medicine chest in the above example may be of some interest to the jury in and of itself, but in the context of the film it is charged with meaning and becomes a symbol of the plaintiff's multiple problems."

Herlihy, *supra* note 45, at 150 (quoting Preiser & Hoffman, *Day in the Life Films—Coming of Age in the Courtroom*, TRIAL, Aug. 1981, at 26).

268. *Thomas*, 465 F. Supp. at 571.

269. Herlihy, *supra* note 45, at 140 (quoting 1 J. WIGMORE, EVIDENCE § 24, C.P. Tillers rev. 1970).



however probative, just too dangerous to put in front of the jury. Here lies one of the same internal inconsistencies. The film is dramatic, showy, staged, and scripted as well as illustrative of testimony, demonstrating for the jury the “full extent” of the thing to be adjudicated.<sup>270</sup> The court’s anxiety that the jury will fail to consider the film in the appropriate light, that no jury instructions could constrain or guide the proper consideration of the film at trial, and that film’s perceived meaning cannot adequately be countered (undermined, criticized, or altered), misunderstands the semiotics of the cinematic medium. It also misunderstands how meaning is made at the trial process over which the judge presides.

As explained *supra* Part II, the semiotics of cinema instructs that a film’s meaning is constituted in large part through its viewer-subject, the ideological viewer whose perspective and understanding emerges from the structured gazes of the film and its interpretive cues. The perspective of that ideological viewer—the one the court fears will co-opt the deliberation process—is not the jury. It is one effect of film. The jury, surely affected by the film, is nevertheless also acted on by many, many other forces, one of which is the judge, the other their sworn duty to follow the judge’s instructions. Another effect of film is its self-consciously constructed form, its self-reflexivity that encourages the “spectator [to] say at one and the same time that the basic material of the film is authentic while the film is also truly cinema.”<sup>271</sup> A day-in-the-life film by its nature is supremely self-conscious in form and message; its making and its meaning are for the sole purpose of persuading a jury that the plaintiff’s suffering must be compensated. While the day-in-the-life film represents the plaintiff’s injury and its effects in spaces beyond the courtroom, if it is properly authenticated with the filmmaker (describing techniques of filming and production details) and smartly cross-examined by defense counsel (who should be permitted to examine outtakes and scripts or be present at the filming), the film cannot help but be presented to the jury as just one rhetorical gesture among the many that will be proffered during the trial.

The court’s anxiety that the film will derail the jury deliberations also misconstrues the trial process, limiting its significance to that mechanism through which the truth must be coaxed, rather than one in which truth is inseparable from the play of the game. Worried that the jury’s undisciplined interpretation of the film will unsettle the delicate balance of the rest of the evidence, these courts perpetuate a

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270. *Cisarik v. Palos Cmty. Hosp.*, 579 N.E.2d 873, 874 (Ill. 1991).

271. *BAZIN*, *supra* note 174, at 48.

notion of law as revealing a truth they know to exist—whatever that could be said to be and however they may know it to be true—and not about the production of truths, about the process of telling and judging stories, about the play itself.

b. *Grimes and Bannister: An Emerging Paradigm for Filmic Evidence*—There are a few cases that address in a methodological fashion the assertive and interpretable aspect of staged and scripted filmic proffers inaugurating, as previously said, a new paradigm for filmic evidence. These are the cases considered in this concluding section. These cases show that evidentiary doctrine is sufficiently capacious to accommodate filmic evidence as one kind of testimonial. These cases also show that the proposal that courts encourage the evaluation and weighing of film as substantive and assertive evidence in terms of some basic elements of film theory and history is hardly revolutionary but already a doctrine in the making.

In *Grimes v. Employers Mutual Liability Ins. Co.*, the court addressed a defendant's usual concerns about plaintiff's proffer of a day-in-the-life film.<sup>272</sup> Thomas Grimes had been injured in an industrial accident. At his trial for damages, he offered into evidence a film depicting him performing various daily activities with difficulty, such as driving a car, loading a gun, operating a fishing reel, hugging his daughter, and tending to his handicapped brother. After confirming the film's proper authentication and relevance, the court evaluated the defendant's other objections of prejudice and hearsay. As to the prejudice objection, the court concluded that the probative value of the film outweighed any prejudice because the film was the "best evidence of the plaintiff's pain and suffering" and "visually demonstrated the extent and impact of the injury."<sup>273</sup> In deciding that the film is the "best evidence" of plaintiff's pain and suffering, this court does not do what other courts do, which is to conclude that the film is merely illustrating testimony. To the contrary, this court explicitly says that the film is not cumulative and "will add to the medical testimony."<sup>274</sup> What the film adds besides "visually demonstrating the extent and impact of the injury" remains unexplained. However, at least the *Grimes* court does not perpetuate the inconsistencies of the other cases that both admit film as demonstrative and then justify its prejudicial effect with homage to the film's substantive, informative, and material contributions to the evidence.

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272. *Grimes v. Employers Mut. Liab. Ins. Co.*, 73 F.R.D. 607 (D. Ala. 1977).

273. *Id.* at 610.

274. *Id.*

The *Grimes* court also overruled defendant's hearsay objection, but did not deny that the film was asserted for its truth and therefore properly considered hearsay. The court acknowledged

little direct authority on the hearsay question, the general conclusion is that motion pictures are not hearsay and are admissible if subject to cross-examination through the witness who verifies and uses the film. The explanation given for this conclusion is that the verifying witness is merely using the film as a means of communicating his observations. . . . While this explanation is sufficient for [some] situations . . . , a film offered by the plaintiff showing the plaintiff performing tasks to exhibit his disability is like a witness testifying about assertive conduct. A witness's testimony about observed assertive conduct when used to prove the truth of the assertion would be hearsay, and similarly a film showing assertive conduct would be hearsay.<sup>275</sup>

The court blurs its identification of the testifying witness as between (i) the plaintiff demonstrating his disability and (ii) the film demonstrating the plaintiff demonstrating his disability. According to the court, both the film and the plaintiff are asserting, and both assertions are hearsay. Whether both are asserting the same thing (*i.e.*, whether what the plaintiff says is the same as what the film can be understood to say) remains unanswered.<sup>276</sup>

Nevertheless, the *Grimes* court admits the film under former Fed. R. Evid. 803(24) now embodied in Fed. R. Evid. 807, the catch-all hearsay exception that pertains if the hearsay statement is determined to have "equivalent circumstantial guarantees of trustworthiness."<sup>277</sup> The court explains that use of this exception is appropriate, given that the film is "more probative on the material issues of pain and suffering . . . than any other evidence which the plaintiff could procure through reasonable efforts. Guarantees of trustworthiness are provided by having the plaintiff-actor and the verifying witness subject to cross-examination."<sup>278</sup> The court here grapples with former Rule 803(24)'s requirements that the exception only apply when "(A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence

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275. *Id.* at 610–11.

276. Also unanswered is whether the court would consider the plaintiff's statements in the film as being subject to Fed. R. Evid. 801(d)(1)(B) (prior consistent statement of witness offered to rebut charge of recent fabrication or improper influence) and therefore not hearsay.

277. *Grimes*, 73 F.R.D. at 611.

278. *Id.* at 611.

which the proponent can procure through reasonable efforts. . . .”<sup>279</sup> It is at least debatable whether the film is the best evidence of the plaintiff’s pain and suffering; there is no explanation of how the film’s portrayal of pain and suffering is better than the testimony that would be elicited from the plaintiff himself. Given that the filmic proffer was not admitted or considered as demonstrative evidence, however, the possibility for the film to prove “a material fact” presents no categorical conundrums.

The merits of the *Grimes* court’s conclusion, that the day in the life film bears the requisite indicia of reliability to warrant a hearsay exception under former Rule 803(24), is debatable. Consider that it was prepared for purposes of trial and that the film shows activities that are unlikely to be everyday chores, loading a gun when not hunting, and using a fishing reel when not fishing.<sup>280</sup> Whether or not the result in *Grimes* is a correct exercise of the court’s discretion, at least the court arrived at the conclusion that film is both real and substantive evidence as opposed to demonstrative.<sup>281</sup> In effect, the court in *Grimes* considers the film both the “thing itself”—an example of the plaintiff’s pain and suffering—and also testimony concerning the extent and impact of the plaintiff’s pain and suffering. This is precisely what most film is: trace evidence of lived experience and a representation of that lived experience through the eyes of the filmmaker.<sup>282</sup> Although the *Grimes* court’s suggestion that cross-examination of the plaintiff will solve any “problems with perception . . . or meaning, and . . . sincerity”<sup>283</sup> may be criticized, it remains the case that cross-examination of the filmmaker and his or her techniques, vigilant discovery practices, and critical interpretation of the film’s constructed meaning are crucial to the proper use and evaluation of filmic evidence for trial.

Few courts, other than *Grimes*, have explicitly analyzed filmic evidence in terms of its assertive quality, independent of any verifying

279. Former Fed. R. Evid. 803(24), now Fed. R. Evid. 807.

280. See Herlihy, *supra* note 45, at 137 (criticizing the result in *Grimes*).

281. “Real” evidence is just another way of talking about “the thing itself.” See 1 J. WIGMORE, EVIDENCE § 214 at 944 (Tillers rev. 1983) (using the term “autoptic profference” instead of “real evidence” to avoid “the fallacy of attributing an evidential quality to that which is in fact nothing more or less than the thing itself”); see also McCORMICK, *supra* note 15, § 212 n.2 (contrasting demonstrative evidence and real evidence); Herlihy, *supra* note 45, at 140–41 n.58 (“The assertion of the *Grimes* . . . [court] that the unpleasant film is not unduly prejudicial because the injuries it depicts are equally unpleasant, would be an absurd tautology were it not premised on the assumption that the films constituted real evidence.”).

282. “[T]he cinema has at its disposal a whole arsenal of means whereby to impose its interpretation of an event on the spectator.” BAZIN, *supra* note 174, at 26. This excludes animation and computer generated graphics, of course.

283. *Grimes*, 73 F.R.D. at 611.

witness's statements at trial.<sup>284</sup> There is a case to be made that those courts that discussed filmic evidence as a kind of "silent witness" are obliquely characterizing film as hearsay, especially in regard to automatic surveillance films where no one is available to authenticate the filmic representation.<sup>285</sup> Cases reviewing the admissibility of day-in-the-life films, however, are a unique subset. Only here do the courts begin to explicitly conceptualize film as uniquely combining myth and reality, a troublesome but perhaps understandable combination for the trial itself.

The Tenth Circuit case of *Bannister v. Town of Noble*,<sup>286</sup> in which the court of appeals evaluated the lower court's admission at trial of a day-in-the-life film, continued in a more detailed fashion the work of a more nuanced jurisprudence of filmic evidence begun by the *Grimes* court. Although not explicitly dealing with the contradictory exhortations (or the anxieties underlying them) that courts evince when evaluating film as evidence, the *Bannister* court methodically questioned the filmic proffer in terms of its mode of production, its inherent assertive qualities, and its effect on the viewer. The court first acknowledges that the day-in-the-life film is often anything but a fair and accurate representation of the day-in-the-life of the plaintiff. "[T]he fact that a plaintiff is aware of being videotaped for [the purposes of litigation] is likely to cause self-serving behavior, consciously or otherwise."<sup>287</sup> The court also takes note of the "dominating nature of film evidence" and the viable concern that "a jury will better remember . . . evidence presented in a film."<sup>288</sup> In other words, the court determines that the jury's experience of "seeing with their own eyes" the impact of the injury on the plaintiff may unduly influence how the jury weighs and evaluates other evidence; the jury may improperly feel as if the film is the guidepost against which all other evidence must be measured. As such, the *Bannister* court encourages thorough cross-examination of the plaintiff regarding the film's representations.<sup>289</sup> It

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284. The early case of *Haley v. Byers Transportation Co.* affirms the exclusion of several day-in-the-life films on the ground that "[they] were self-serving, being based solely upon plaintiff's actions (rather than his words), and that they would have constituted in reality testimony from plaintiff which was not subject to cross-examination." *Haley v. Byers Transp. Co.*, 414 S.W.2d 777, 780 (Mo. 1967). In the more recent case of *Cisarik v. Palos Community Hospital*, the dissent criticizes the majority's holding that day-in-the-life films are merely a species of demonstrative evidence, encouraging a more refined evaluation of these evidentiary proffers in light of their "special nature." *Cisarik v. Palos Cmty. Hosp.*, 579 N.E.2d 873, 876 (Ill. 1991) (dissenting opinion).

285. See *supra* notes 114 and 115 and accompanying text (discussing silent witness theory).

286. *Bannister v. Town of Noble*, 812 F.2d 1265, 1269 (10th Cir. 1987).

287. *Id.* (brackets in original) (citations omitted).

288. *Id.*

289. *Id.* at 1270.

also instructs that the initial examination by the judge of the film should be conducted "outside the presence of the jury."<sup>290</sup> Although the court does not suggest cross-examining the filmmaker or encouraging pre-trial disclosure as to the making and editing of the film,<sup>291</sup> this follows logically from the court's careful attention to this kind of evidence.<sup>291</sup>

The *Bannister* court's guidelines for the district court stop short of expressly stating that the film, despite its ideology of transparency and revelation, is little more than rhetoric. The court also does not expressly say that film, as with other forms of substantive evidence, must be weighed and evaluated, interpreted and critiqued for all of its possible meanings, as if it were a testimonial.<sup>292</sup> Nevertheless, the *Bannister* court does acknowledge that the film in many ways speaks as its own witness and that there is value to a structured analysis of filmic evidence that interprets the film in terms of its distinctive formal representational qualities. Importantly, the *Bannister* court's guidelines imply that a film, be it a day-in-the-life film or some other kind of filmic proffer, might convey more than one message and signify in multiple ways. Its use at trial does not derail the trial's purpose. To the contrary, it reaffirms the trial as ideally a discursive process the result of which is fair and reasoned judgment.

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290. *Id.*

291. See also Habert, *supra* note 29 (in lieu of arguments at trial regarding prejudice, suggesting procedural safeguards invoked during discovery that might minimize the prejudicial effects of day-in-the-life and surveillance films that are otherwise admissible).

292. Realizing that, for the most part, judges interpret documents and juries interpret testimony, it does not necessarily follow that judges would be the primary interpreters of filmic proffers. In light of the case law's apparent movement toward aligning film with testimony (rather than film with documents), it appears that these cases also suggest that jurors are in the better position to evaluate the film. Perhaps this is true. In some ways, all of these cases are examples of judges interpreting filmic proffers as if they were documents: if unambiguous as to their meaning, they are determined to stand for whatever the court says (the extent of the plaintiff's injury, the cause of the accident, the defendant's presence at the scene of the crime); and, if ambiguous, they are excluded as irrelevant or not probative or subject to cross-examination to correct for the misleading message the films might otherwise impart. Were the cases to move in the direction of *Grimes* and *Bannister*, to hold that all filmic evidence is a form of hearsay (assertive conduct that must be tested for reliability as to the truth it asserts), the interpretation of the film would be put to the jury, but only after the testing is assured to be thorough and effective (whereby testing amounts to a kind of interpretation that focuses on the film medium and form in conjunction with content). Either way, the court acknowledges the value of, and methodological bases for, interpreting the evidence as film in terms of its formal representational qualities.

## CONCLUSION

These are important lessons regarding the nature of film hermeneutics, although, as pointed out, they are lessons that have been learned by film scholars and literary critics decades ago. Were more courts to grapple with filmic proffers in light of basic film theory or even along the lines preliminarily laid out by the *Grimes* or *Bannister* decisions, the anxieties that appear in the crevices of the inconsistent holdings and contradictory statements about the value and meaning of film as evidence in terms of the trial function might dissipate. Persistent questioning and evaluation of film as a text or as testimony will more easily expose the film's meaning as neither overdetermined nor undeterminable; instead, once subject to methodological analysis and persuasive interpretation, film, like other expressive representations, will be understood as the aesthetic medium it is. Interpretation of filmic proffers will reveal that films do speak for themselves in multiple and rich ways, but that what they say is not unaccounted for by an absent witness or an unimpeachable one. Films "speak" in terms of textual cues, cues specific to the medium and its history as a public aesthetic. These cues create webs of symbolic and literal meanings and, admittedly, often project a dominant view in light of the ideological (and illusory) experience of seeing and being seen. Revealing itself to be a purposefully assembled representation, but depending for its meaning on its indexical and naturalized relationship to the event being filmed, the film constructs a view, and an idealized viewer, for that matter, that can be interrogated on the levels of content and form for how it says what it does and whether, in fact, it is saying anything else.

This kind of attention to filmic proffers would assure the treatment of film not as disembodied testimony, dominant but unexplained, but as assertive and accountable, like a witness or an authored document. It would also reaffirm the trial judge's role as arbiter of the evidence that will be presented to the jury for close evaluation. The judge, as a gatekeeper, is like a critic who structures the inquiry rather than determines its outcome. He or she does this not because the result of the case is obvious and predictable, but because the facts conflict and the verdict is an as-of-yet unforeseen outcome. Were the opposite true—were the trial simply the way to uncover the singular truth of the matter rather than a balanced and fair process for evaluating evidence in light of burdens of proof and the substantive law alleged to be broken—law

would be more like a hard science than a social process,<sup>293</sup> and a jury's judgment would be unnecessary (perhaps, even anathema). But the "judgment of peers" is not an anathema; it is at the core of our American judicial system.<sup>294</sup> Juries rarely decide the "truth" of who did what or how; more often, juries are asked to determine why the act was committed and whether there are good reasons the defendant should not be held responsible.<sup>295</sup> These questions of "why" and "whether responsible" are social covenants, not truths, and are subject to normative regulation through legislation and to reevaluation on a case-by-case basis through the common law.

As Madhavi Sunder has recently written, "Culture is getting the bad rap here, when really law is to blame."<sup>296</sup> Current evidentiary doctrine fails to consider film when offered at trial as a cultural object in terms of those qualities that have made it one of the twentieth century's greatest contributions to art, communication, and the development of the public sphere.<sup>297</sup> The anxieties exposed through the analysis of the case law—the waning reliance on the live witness and the perception of the trial as an undisciplined and capricious process—dissipates once film is properly evaluated in terms of these basic principles of the discipline devoted to film study and history.

The use of film in court is growing.<sup>298</sup> An evidentiary doctrine that cannot consistently manage filmic proffers in light of their uncontroversibly powerful impact on judges and juries alike will unnecessarily realize, rather than allay, the anxieties latent in the case law. At least, current doctrine should consider filmic proffers in terms of the overlapping institutional norms of film and law. There is room in the law for an evidentiary doctrine of film. Judges should take their role as film critics seriously and embrace the twentieth century study of cinema for the reasoned and impartial promotion of justice into the twenty-first.

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293. *But see* BRUNO LATOUR, *SCIENCE IN ACTION: HOW TO FOLLOW SCIENTISTS AND ENGINEERS THROUGH SOCIETY* (1987) (describing generally the social construction of scientific facts); THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962) (describing scientific inquiry as controlled by socially determined disciplinary paradigms that guide and inform fact-gathering).

294. *See, e.g.*, JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* (1994).

295. Silbey, *supra* note 259, at 152–58.

296. Madhavi Sunder, *Cultural Dissent*, 54 *STAN. L. REV.* 495, 566 (2001).

297. HANSEN, *supra* note 170.

298. *See* RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* 26 (2000) (discussing, *inter alia*, the growing "proliferation of visual media inside the courtroom" and its effects on the trial process).



